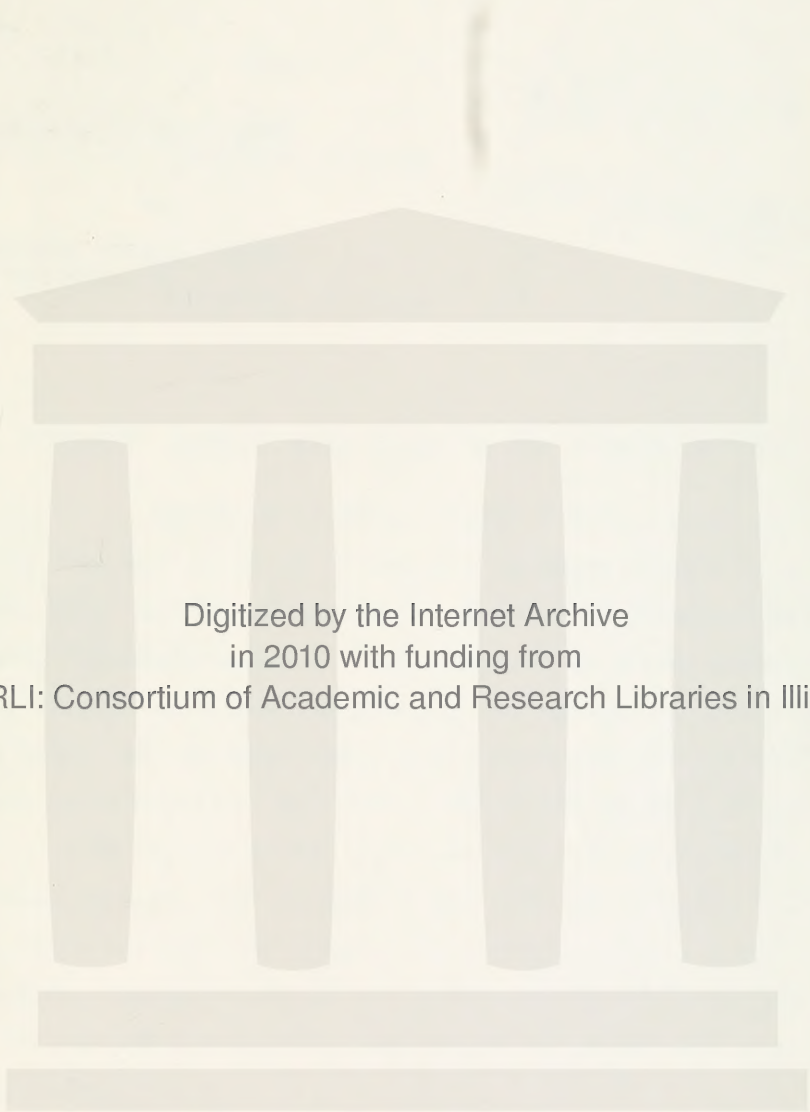
CHICAGO BA
79814
ASSOCIATIO



Digitized by the Internet Archive
in 2010 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

http://www.archive.org/details/illinoisappellat187illi

JOURNAL
JAN 11
1023
CHICAGO BAR ASSOCIATION
79814
9/61
92

October Term, 1913. No. 44 - 19433

187 I.A. 1

ELIZABETH GORDON SMITH,
Defendant in Error,

vs.

AMERICAN CORSET COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, American Corset Company, prosecutes this writ of error to review a judgment entered in the Municipal Court of Chicago against it in favor of Elizabeth Gordon Smith, defendant in error. The defendant in error, plaintiff below, brought an action for $165.37, for balance alleged to be due for salary and expenses while in the employ of the plaintiff in error under a written contract. Plaintiff in error filed a set-off of $305.70, for goods, wares and merchandise furnished to defendant in error and retained by her when she quit her employment. The trial was had before the court without a jury. The court found for the plaintiff on her claim, and for the defendant below on its set-off, and entered judgment for plaintiff and against defendant for $18.

No written propositions to be held as law in the decision of the case were submitted to the trial court. No questions of law are, therefore, raised by the record, which we can review. Merrimac Paper Co. v. Illinois Trust & Savings Bank, 129 Ill. 296; Bank of Michigan City et al. v. Haskell et al., 134 id. 587; Mutual Aid Association v. Hall, 118 id. 169. No questions upon the rulings on the evidence on the trial are preserved in the record or argued by counsel. The only question then that is open for our consideration on this writ of error is whether the evi-

BOUND JAN 11 1962

CHICAGO BAR ASSOCIATION 79814

dence sustains the judgment. Upon a review of the evidence, we cannot say that it does not support the judgment. The judgment is affirmed.

AFFIRMED.

JAN 11 '62

October Term, 1913. No.
77 - 19459

1024

187 I.A. 2

THE QUALITY CAR COMPANY,
a corporation,
Defendant in Error,

vs.

J. J. CORKILL,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment in the Municipal Court of Chicago. The plaintiff, The Quality Car Company, sued the defendant, Corkill, for a balance of $142.83, claimed to be due for work and labor performed, material furnished, and storage. The main proof was an account stated, and the question here is one of sufficiency of proof of an account stated. The trial was before the court without a jury. No propositions of law were submitted, and, therefore, no questions of law are preserved for our consideration, except the rulings of the court on evidence.

The evidence of an account stated covering the claim sued for is abundantly sufficient to establish a stated account. The plaintiff, by its bookkeeper, Ellis, proved that it mailed invoices to Corkill every time when any work was done for him or material was furnished. In addition to this, it sent him bills on the first of every month, and he never made a protest or objection concerning the bills, or denied that he owed the money. The defendant Corkill admitted that for a long time prior to the commencement of the suit he had been receiving the bills from the plaintiff at his office in the First National Bank building in Chicago, Illinois. Defendant did not deny the testimony of Ellis. We think on this testimony the trial court was justified in finding

that an account stated had been established. Wurlitzer Co. v. Dickinson, 153 Ill. App. 36; Dick v. Zimmerman, 307 Ill. 630.

Where a case at law is tried before the court without a jury, it will be presumed that the court disregarded all incompetent testimony and decided the case upon the competent evidence alone. Knight v. Collings, 287 Ill. 348. The principal objection to evidence received was to the admissibility of plaintiff's ledger. This was offered not to establish the account stated, but to show that items of credit claimed by Corkill had been credited to him in the account. The submission of the ledger for that purpose in view of the testimony as to the manner in which it was kept and the sources from which the entries therein were posted was not erroneous.

Plaintiff's statement of claim declared upon an account stated. Defendant's set-off arises from an entirely distinct and separate transaction for unliquidated damages, namely, a previous contract between the parties for the sale and purchase of an automobile which was the subject matter of a previous suit between the parties wherein the plaintiff had recovered a judgment against the defendant. The defendant's set-off could not properly be brought into the case.

The judgment is affirmed.

AFFIRMED.

October Term, 1913. No. 1025

88 - 19470

WISCONSIN IRON AND WIRE WORKS, a corporation, Defendant in Error,

vs.

GEORGE W. STILES CONSTRUCTION COMPANY, a corporation, Plaintiff in Error.

Error to Municipal Court of Chicago.

187 I.A. 4

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought in the Municipal Court of Chicago by the defendant in error, Wisconsin Iron & Wire Works, against the George W. Stiles Construction Company, plaintiff in error, for $71.30, claimed to be a balance due on a contract for the furnishing by the defendant in error to the plaintiff in error of certain ornamental iron work for a post office. Proof of the plaintiff's prima facie case was waived on the trial, and thereupon the defendant in error rested its case.

Plaintiff in error then offered in evidence its letter to the defendant in error, dated June 27, 1913, in which was enclosed a check for $104.35, with the statement that it was the balance due as shown by plaintiff in error's books, and it further stated that the defendant in error had failed to give plaintiff in error credit for certain items amounting to $71.30; it also put in evidence the check for $104.35 enclosed in the letter with the endorsements thereon. Plaintiff in error also offered a letter of June 28, 1913, written by defendant in error to plaintiff in error in reply to the foregoing letter of June 27th, in which it is stated that the Wisconsin Iron & Wire Works have credited the account of plaintiff in error for freight and drayage on area gratings, erecting hitching rail, and two other freight

bills, making a total of $12.50, and objecting to the item of $58.80, and claiming that the account of the plaintiff in error stands debited with $58.80. This was all the evidence offered in the case. Judgment was rendered in the court below against plaintiff in error for $71.30. A judgment for $58.80 was warranted by the waiver of proof by the defendant of the plaintiff's case. The letter of June 28, 1912, states that the defendant in error had credited the account with items amounting to $12.50; hence the judgment is too large by that amount. The judgment will be affirmed on the defendant in error's entering a remittitur of $12.50 within ten days, each party to pay its own costs; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

October Term, 1915. No. 1626

108 - 19491

GEORGE SHIELDS,
Defendant in Error,

vs.

BARGENDAHL-BASS ENGINEERING & CONSTRUCTION COMPANY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 5

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for $500 entered upon the verdict of a jury in the Municipal Court of Chicago in an action for damages on account of personal injuries.

George Shields, plaintiff below, defendant in error here, was a structural iron worker of some eight years' experience and was working for defendant below, plaintiff in error, at his regular occupation on March 25, 1913, in the erection of a school-building in the city of Chicago. There was working with Shields just prior to the accident of which he complains another iron worker by the name of Schoekner. The general foreman of the work was one Gobleman who had authority over both Shields and Schoekner. Just prior to the accident, Gobleman directed them to come to a certain place of the work near which he (Gobleman) was standing and assist in placing and connecting a certain steel beam. Gobleman stood on a brick wall and the beam in question was to rest on the wall where Gobleman was standing at one end and be connected with another I-beam or lintel which extended across a corridor and which ran parallel with the wall on which Gobleman stood. The lintel in question was an I-beam some 4 inches wide, 12 to 15 inches high and 14 feet long, weighing some 400 pounds. There were flanges at the top and bottom of this beam. The beam which was to be put in place was a 12 inch beam about 13 feet long, and weighed

some 240 pounds. Gableman called to Shields and Scheckner saying, "Come over here, fellows, and we will put this beam in." Shields and Scheckner thereupon went out upon the 14 foot lintel and sat straddling it, facing each other, with the end of the 12 inch beam, to be placed, between them. Gableman then said, "You get that end and I'll get this end." Shields and Scheckner put their arms under the 12 inch beam, lifted it up and started to lift it over the top flange of the 14 foot lintel upon which they sat. Gableman, at the same time, lifted the opposite end of the 12 inch beam for the purpose, as he testified, of steadying it while the end at which Shields was working was placed between the two flanges of the lintel. While the men were in these respective positions, the lintel upon which Shields and Scheckner were sitting, tipped toward the wall where Gableman was standing and both beams, with Shields and Scheckner, fell to the floor below, a distance of from 10 to 14 feet. Shields and Scheckner testified that Gableman pulled the beam toward himself, thus causing them to lose their balance, while Gableman testified that Shields and Scheckner lost their hold on the 12 inch beam and in trying to recover it, lost their balance and fell.

Except as above, there is no conflict in the testimony with reference to any of the essential facts of the accident. It happened in daylight and no evidence was offered of any hidden dangers or any perils unknown to the plaintiff.

Serious error was committed in the instructions given to the jury. In view, however, of the undisputed facts in the case, we do not deem it necessary to discuss the instructions.

It is the well settled law of this state that the master is not liable to the servant for an injury received through the negligence of a foreman while acting as a co-laborer with the servant where the injury is the result of the way in which the

common work is done and not of any exercise of the foreman's authority. Call v. Beckstein, 173 Ill. 187; Maier v. Selke, 211 id. 512. In any view of the evidence, Gableman, at the time of the accident complained of, was a fellow-servant of the plaintiff Shields as to all acts which in any way contributed to the plaintiff's injuries. The allegation of negligence upon which the plaintiff sought to recover was that the defendant negligently turned over and caused to fall the beam on which the plaintiff was sitting. Assuming the truth of the plaintiff's account of the accident, that Gableman pulled the beam, of which he and the plaintiff were holding opposite ends, in such a way as to overturn the beam upon which the plaintiff was sitting, causing him to fall, it is undisputed that the plaintiff and Gableman were co-operating at the time in the physical act of placing and connecting the particular beam which they were handling. The alleged act of Gableman in pulling the beam was performed in the course of this common employment and cannot, by any fair construction of the evidence, be said to be an act done in the exercise of the authority vested by the plaintiff in error in Gableman to direct the work and the workmen. That the foreman and workmen under such circumstances are fellow-servants as to such acts is a familiar rule of law in this state.

There is no evidence in the record of any direction given by Gableman to the plaintiff, directing him into a place of unusual danger. The only order given by Gableman to the plaintiff was that he and his companion, Schechner, go to the place where the beam was to be set and assist in placing it. The order was in general terms and there was nothing in it which had any tendency to mislead the plaintiff as to whatever danger there might be in doing the work, and there was no direction as to the method to be employed in doing it or as to particular positions

to be assumed by the workmen. Such an order could not mislead the plaintiff in any way and could not be the basis for recovery in a tort action even if the recovery had been sought on that basis. Republic Iron Co. v. Lee, 227 Ill. 248; Becker v. Illinois I. & B. Co., 161 Ill. App. 498.

The plaintiff Shields at the time of the accident was an experienced structural iron worker of seven or eight years' experience in doing the particular kind of work in which he was engaged at the time he was hurt. There is no evidence in the record that the conditions under which he was laboring were unusual. All the conditions and dangers were as open and apparent to Shields as to the defendant or its representatives. There was no claim that any of the conditions or dangers were unknown to the plaintiff. Upon this state of facts it can hardly be seriously contended, we think, that all the risks by reason of which the plaintiff was injured were not assumed by him.

The work being done by the plaintiff and his fellow workman at the time of his injury was in the erection of a building, the conditions under which he labored were temporary and constantly changing by reason of the necessities of the work itself. It is elementary that the ordinary rules imposing upon the master the non-delegable duty of furnishing his employee with a reasonably safe place to work do not apply under such circumstances. Village of Montgomery v. Robertson, 230 Ill. 466; Hastley v. Fuller Co., 166 Ill. App. 86; Geraghty v. Grace Co., 157 id. 309.

Upon the facts there can be no recovery in this case. The judgment is reversed.

REVERSED.

October Term, 1915. No.
153 - 19543

L. FISH FURNITURE COMPANY,
a corporation,
Defendant in Error,

vs.

RELIABLE STORAGE & VAN COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 6

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The L. Fish Furniture Company brought an action in the Municipal Court of Chicago against Elizabeth Caird and the Reliable Storage & Van Company, a corporation. The writ was served as a summons upon the Van Company, and no property having been taken upon the writ, the action was changed to trover. The plaintiff's amended statement of claim was for the value of goods stated to be the property of the plaintiff and alleged to have been wrongfully converted by the defendants.

Elizabeth Caird was served with a summons but the action was later dismissed as to her. The plaintiff below filed with its statement of claim copies of the instruments relied on to show title, being copies of a note and chattel mortgage from Elizabeth Caird to the plaintiff. The Reliable Storage & Van Company filed an affidavit of merits stating that it did not at any time store the goods for the plaintiff nor wrongfully take or detain such goods; that defendant never heard of the chattel mortgage in question and never had any dealings with the plaintiff, and that no demand was made upon it by the plaintiff for the goods.

The evidence showed that, in 1913 and for some years prior thereto, the woman, who was made a defendant under the name of Elizabeth Caird, had been running a rooming or lodg-

ing house in South State street, Chicago. She was, in 1912 at least, known by the name of Mrs. E. Johnson. On August 10, 1909, she appears to have purchased a quantity of household furniture from the plaintiff, the L. Fish Furniture Company, at which time she executed to that company her promissory note for $1148.70 for the purchase price of the furniture. The note was payable in monthly instalments, the last instalment falling due on July 11, 1912. At the time of the purchase she also executed to the plaintiff, L. Fish Furniture Company, her chattel mortgage bearing date August 10, 1909, covering the furniture so purchased, and the mortgage was acknowledged and on August 27, 1909, duly recorded. The note and mortgage were executed in the name of Caird. Mrs. Caird (or Johnson) used the furniture in her rooming house until March 11, 1912, when she caused a quantity of her furniture, including some or all that she bought from the plaintiff furniture company, and other furniture, to be placed in storage in the warehouse of the defendant, Reliable Storage & Van Company. She made her arrangements in regard to the hauling and storage with George W. Jones, the president of the storage company, the negotiations being conducted by telephone so that Jones never saw Mrs. Caird (or Johnson) until the case was tried. Jones testified that on March 11, 1912, the day the goods were received, he wrote out a warehouse receipt for the same and gave it to his son to be mailed to Mrs. E. Johnson, 53 East Congress street. There is some conflict of evidence as to whether Mrs. Caird (or Johnson) ever received this receipt from the storage company. Mrs. Caird testified that she gave one Haase, an employe of the L. Fish Furniture Company, plaintiff below, the address of the storage company and sent him to that company's warehouse to look after the goods, and that while Haase was at her home she called the storage company by telephone and told a person, who said he was Mr. Jones, that

Haase was going out there and that he represented the Fish company, which had a chattel mortgage on the furniture. Haase testified that he heard Mrs. Caird (or Johnson) make such statements while talking at the telephone; that Mrs. Caird gave him a slip of paper reading, "Please deliver to bearer warehouse rece. E. Johnson ne Caird;" that he went to the storage company's warehouse and presented this slip to George W. Jones, who thereupon, in his presence, wrote and delivered to him the warehouse receipt in question, and that he then told Jones that he (Haase) represented the L. Fish Furniture Company, who were the owners of the goods, and had come to see about Mrs. Caird's warehouse receipt. He fixed the time of this occurrence as April, 1913.

This testimony was denied by Jones who testified that no one at any time called upon him from the Fish company with reference to the goods in question; that he never saw Haase prior to the trial of the case; that he never heard the name Caird in connection with the matter until he was served with the replevin writ, and that he knew the woman only by the name of Mrs. E. Johnson.

On July 16, 1913, the goods were taken out of storage, no charges having been paid, and were sold by the defendant, Reliable Storage & Van Company, to one Rosenstein on July 31, 1913. One Stein, a bookkeeper and credit man employed by the L. Fish Furniture Company, testified that in August, 1913, he called the Reliable Storage & Van Company by telephone and asked Jones how much storage was due on the Fish company's goods, and Jones told him the goods were sold, and that he asked Jones if he did not know the Fish company had a mortgage and a warehouse receipt on the goods and why Jones did not notify them, and Jones said that he did not think it was necessary.

On the trial, after giving the usual instructions concerning the elements to be considered in weighing the evidence,

the court instructed the jury that the property sold by the defendant belonged to the plaintiff and was wrongfully sold, and that they should find the defendant guilty and assess the plaintiff's damages at such sum as they found from the preponderance of the evidence the property was worth at the time of the sale, and delivered to the jury a form of verdict as follows:

> "We, the jury, find the defendant Reliable Storage & Van Company, guilty of having maliciously, wickedly and intentionally, and with intent to injure and defraud the plaintiff, and convert to its own use plaintiff's goods and chattels, and assess the plaintiff's damages at the sum of..... dollars,"

adding, "whatever you gentlemen have in mind the property was worth at that time."

There were three questions of fact for the jury to determine: (1) did the defendant below have notice of the plaintiff's chattel mortgage? (2) the value of the goods covered by the mortgage at the time of the sale by the defendant, and (3) whether storage was due the defendant at the time of the sale of the property. These issues of fact should have been submitted to the jury, and evidence should have been admitted on behalf of both parties upon the whole case. The court, however, after plaintiff had adduced several witnesses and one witness had been produced on behalf of the defendant, restricted the defendant to proof of the value of the goods in question over the objections of the defendant made at the time, and submitted only one question for the jury to pass upon, namely, the value of the property at the time of the sale. This was reversible error.

The court also erred in submitting to the jury one form of verdict which required them to find the defendant, Reliable Storage & Van Company, guilty of having maliciously, wickedly and intentionally and with intent to injure and defraud the plaintiff, and convert to its own use plaintiff's goods and chattels. No such averments are made in the affidavit in replevin

or statement of claim filed by the plaintiff, nor was there any evidence to base it on.

Unless the defendant knew, or had notice, of the chattel mortgage executed by Elizabeth Caird to the plaintiff, and knew that it covered the goods in question, or had notice thereof, it was not liable to the plaintiff for conversion of the goods. The evidence on this question was contradictory and the question as to whether the defendant had notice of the plaintiff's chattel mortgage became a question of fact for the jury, not a question of law for the court. The record of the chattel mortgage was not notice to the storage company of a lien on the property of Mrs. E. Johnson, with whom the evidence shows the defendant, the plaintiff in error, dealt with reference to the property. In view of the conflict of evidence as to whether the storage company had actual knowledge of the mortgage and of the interest of the furniture company in the property, the issue should have been submitted to the jury with proper instructions. The weight of authority is that a mortgage on personal property made by one who is not the owner of the property, or by the owner in a fictitious name, and placed on record is not constructive notice to any one dealing with the owner in his true name. The record in such case would give no information nor would it lead to any knowledge of the fact that the mortgage existed upon the particular property in question. Mackey v. Cole, 79 Wis. 436; New England Bank v. Northwestern Bank, 171 Mo. 307; National Cash Register Co. v. Weit, 158 Ill. App. 166. The question under the evidence was whether, outside of the record of the chattel mortgage, the storage company had sufficient knowledge of the facts or circumstances to put it on inquiry concerning the chattel mortgage in question. That question was for the jury and the court erroneously took it from the jury. For the errors indicated, the judgment of the court below is reversed and the cause remanded. REVERSED AND REMANDED.

October Term, 1913. No.

238 - 19619

MATTHEW F. BOZINCH,
Defendant in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 3

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Matthew F. Bozinch, defendant in error, plaintiff in the trial court and herein referred to as plaintiff, recovered a judgment against plaintiff in error, herein referred to as defendant, of $408.95, in an action of the fourth class in the Municipal Court of Chicago, for damages to an automobile driven by the plaintiff himself. Defendant, by its affidavit of merits, denied the negligence charged in the plaintiff's statement of claim.

Chicago avenue runs east and west and has double street-car tracks therein, the westbound cars being operated on the north track and the eastbound cars on the south track. Hoyne avenue runs north and south, and, at the time of the accident in question, March 8, 1911, was paved with asphalt. The street-car that collided with plaintiff's automobile was going west on the north track and plaintiff was driving south. According to the plaintiff's version, he was driving at the rate of about fifteen miles an hour until he got in the block north of Chicago avenue when he traveled at the rate of about ten miles an hour. When he came to Chicago avenue, he was going at about four or five miles an hour, at which speed he came to the north street-car track. It was a bright day and the accident happened at about five o'clock in the afternoon.

When plaintiff was from 60 to 70 feet north of the

building line of Chicago avenue, he looked for street-cars on that street. At the northeast corner there was a vacant lot so there was nothing to interfere with his view to the east from which direction the street-car that collided with him was coming. When he looked east his vision extended about as far as the middle of the block, and he saw no street-car at that time. When he was about 15 or 20 feet from Chicago avenue, he looked east and saw a car coming about 25 or 30 feet west of Hoyne avenue. Plaintiff slackened up for this car to pass and moved slowly towards the tracks. When this eastbound car, which was going very slow, passed in front of the plaintiff on the farther track, he was practically in the north track, but he stated that he did not see the westbound car until it was two or three feet away from him, and that he then had no time to do anything and his machine was struck by the street-car and pushed about twenty feet west. He claimed damages to the automobile, for which he recovered judgment, and also for certain personal injuries for which the jury awarded him no damages.

The theory of the defendant's case, based upon the testimony of the motorman of the car, was that when the car was about ten feet east of the east cross-walk on Hoyne avenue, the automobile was 100 or 125 feet north of Chicago avenue, and, being so far away, the motorman gave it no further thought until he was about to stop at the west cross-walk, when the automobile swerved around the corner and turned directly in front of the street-car, that the street-car ran only five or six feet after being struck. The defendant's theory of the accident is supported by the testimony of several witnesses. The plaintiff's theory of the accident is supported by two witnesses besides the plaintiff himself. At the close of all the evidence, the defendant moved for a directed verdict, which motion the court denied.

It is contended on behalf of the defendant, plaintiff in error, (1) that the plaintiff below was guilty of contributory negligence, and (2) that the court erred in instructing the jury by an instruction which told them that it is the law that a plaintiff may recover damages for an injury due to a defendant's negligence notwithstanding his own negligence, if any, exposed him to the risk of injury, if the injury to the plaintiff was proximately caused by the negligent act or omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man on his guard to use ordinary care to avoid such injury.

No question of fact is raised in the brief except that the plaintiff was guilty of contributory negligence. The amount of damages occasioned by the accident is not disputed. The plaintiff, in his testimony, conceded that he drove upon the westbound street-car track and was going at a very slow rate for the reason that the eastbound car was passing in front of him. If that car had not delayed him, he could have, with ease, crossed the tracks before the westbound car arrived at Hoyne avenue. At the time the plaintiff reached the crossing, the westbound car was for the first time seen by the plaintiff's witnesses, and it was then about 300 feet east of Hoyne avenue, or had not reached the middle of the block. Under ordinary circumstances the eastbound car would have passed the crossing in time for the plaintiff to have gone safely across the tracks. If the eastbound car had proceeded with the usual celerity of street-cars, the plaintiff would undoubtedly have been south of Chicago avenue at the time the oncoming westbound car crossed Hoyne avenue. The plaintiff's conduct, from the moment he reached the car track until the moment he was struck by the westbound car, was that of passivity, or waiting for the eastbound car to pass the crossing.

The rule of law stated in the instruction is that announced in Sherman & Redfield on the Law of Negligence, Vol. 1, Section 99, (4th Ed.), that a plaintiff can recover notwithstanding his own negligence exposed him to the risk of injury, if such injury was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding such injury. This is, in substance, the doctrine announced in the instruction and it is approved in Swanson v. Chicago City Ry. Co., 248 Ill. 388. It was first quoted with approval in Chicago West Division Ry. Co. v. Ryan, 131 Ill. 474, and is undoubtedly the settled law of this state.

In Horton on Negligence (2nd Ed., Sec. 223), the rule in respect to proximate cause, where the question of contributory negligence arises, is stated to be, "that where the plaintiff's negligence is remote and the defendant's proximate,- or in other words, where the plaintiff's negligence was a condition of the injury but not its juridical cause,- then the plaintiff is not precluded from recovery." See also Milostan v. City of Chicago, 148 Ill. App. 540. In the case last cited, Bishop on Non-Contract Law, Sec. 483, is quoted and is pertinent here. The author says: "If, while one is negligent - perhaps the expression should be, in a state of negligence - another negligently employs an independent force, which, availing itself of the occasion afforded by the former's negligence, works a harm not its natural and probable consequence, but an independent harm, the first negligence is not contributory to the second."

The evidence on behalf of the plaintiff furnished a basis for the instruction complained of, and, assuming that the theory of the plaintiff was the correct theory of the facts, for the jury so found, we are of the opinion that the giving of the

instruction was not reversible error.

We cannot say, taking all the facts and circumstances into consideration, that the plaintiff below was guilty of negligence which contributed to the production of the injuries complained of. Upon the theory advanced by the defendant, which, as we said above, has some support in the evidence, the plaintiff would be guilty of contributory negligence which would prevent his recovery. The jury, however, disregarded that theory of the case and we cannot say that they were not justified in so doing upon the evidence. The judgment is affirmed.

AFFIRMED.

October Term, 1913. No.

256 - 19651

EDWARD C. HART,
Defendant in Error,

vs.

WILLIAM L. MOHR,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 10

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action of replevin was brought in the Municipal Court of Chicago by defendant in error against plaintiff in error. Upon the failure of the bailiff to obtain the property involved, the action was changed to trover. On the trial the plaintiff recovered judgment for the full value of a desk.

It appears from the evidence that one Cazier, in November, 1911, sold all of the capital stock of the Chicago Form Company to the plaintiff in error, William L. Mohr. The Chicago Form Company then had its place of business at 25 North Franklin street, Chicago. Cazier was its president and manager and occupied, as such president and manager, the desk sought to be replevined by the action in question. The desk was in the premises of the Chicago Form Company at the time of the transfer of the capital stock, in the actual use of Cazier as manager of the Chicago Form Company. After the transfer of the capital stock Cazier continued to use the desk as manager, and after he left the office the desk was constantly and continuously used by the officers of the company until the commencement of the action in question. It was always considered a part of the company's assets and was so treated by Mohr, the plaintiff in error. No claim was ever made for the desk until about a year and a half after the transfer of the capital stock and then it was made by Cazier in the name of Edward C. Hart,

defendant in error. The evidence shows that the desk was never in Mohr's individual possession, but always in the possession of the Chicago Form Company. No demand was made upon the Chicago Form Company for the desk. The only demand shown in the record was made upon plaintiff in error Mohr. In our opinion, the finding and judgment of the court is contrary to the evidence. The evidence fails to show any right of action against Mohr for the desk or its value. The judgment is reversed.

REVERSED WITH A
FINDING OF FACT.

March Term, 1913, No.

308 - 19317

TOM B. MEGLEMRY,
Appellee,

vs.

GEBHARDT CHILI POWDER COMPANY,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

187 I.A. 14

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee was employed under a written contract as appellant's exclusive agent in certain territory, including portions of Illinois and contiguous territory, for a definite period of two years to sell its manufactured food products. The contract became effective October 23, 1911. Appellee was discharged April 28, 1913, and began this suit May 24, 1913, claiming damages for wrongful termination and breach of the contract. The verdict was for $4385. A remittitur of $885 was made and judgment was entered for $3500, from which this appeal is taken. The main questions presented are whether the discharge was justified, and, if so, what is the measure of damages.

Appellant's place of business, where its goods were manufactured, is San Antonio, Texas. Under the contract appellee was at his own expense to maintain an office in Chicago for the sale of said goods in the territory designated, and employ salesmen to canvass both retail and wholesale trade therein. The contract contemplated the extension of appellant's business into new territory and recognized the probable necessity of advertising, special offers, etc., in building up a trade therein for appellant's special products. It provided that appellant should extend to appellee such advertising support, special offers, etc., as were then or might be later used by or offered to the trade in Texas or other

parts of the country, as should be sanctioned by appellant. It also provided that appellee should sell appellant's goods on the terms, prices and discounts then granted to the trade, subject to changes that might be subsequently made. Among customs that obtained in its business at that time was what is known as a "guaranteed sale" to jobbers, which meant the right of the jobber to return unsold goods and be reimbursed for the amount paid therefor. Appellant sold directly to jobbers, and, to induce them to give orders, resorted to what is known as the "postal card scheme," whereby its salesmen obtained orders from retailers which were turned over to the jobbers. This was done by procuring a list of the retailer's customers and sending them postal cards entitling the person presenting one to the retailer to a can of 'Chili con carne', one of appellant's products, free. These postal cards were ultimately returned to appellant and redeemed in cash for 15¢ each, the price of a can of chili con carne. This resulted in furnishing purchasers for the jobbers' orders, and was practically an indirect way of guaranteeing sales, at least to the extent said postal cards were distributed and returned for redemption. Another method of inducing the jobbers to take orders was to furnish cases of beans without charge with a certain quantity of appellant's products. With appellant's methods of doing business appellee was familiar when he entered into the contract in question, for he had been in appellant's employ for a year or more prior thereto.

These several matters throw some light on appellant's contentions. Much of the proof in support of these contentions, however, is incompetent. The evidence relied upon by appellant to prove most of the alleged instances of "guaranteed sales" and other alleged irregularities consists of letters from appellant to appellee before and after his discharge, purporting to give information of such sales and irregularities that appellant had received from others, and certain letters from the latter to appellant pur-

porting to give such information. Such letters were incompetent as against appellee. Alone they merely amounted to hearsay or self-serving declarations on the part of appellant. They did not constitute affirmative proof of such sales or their character, and were incompetent except so far as appellee's letters could be construed as an admission of their contents. Reviewing those matters only which were properly before the jury, we think there was sufficient evidence to warrant its finding that there was no good ground for appellee's discharge.

The grounds of discharge stated in appellant's telegram of April 28th and letter of confirmation were that the "jobbers refused to pay, claiming sale of goods was guaranteed, and retailers were complaining that you are not paying them for postals although we have sent you the money for same." These grounds were enlarged upon, however, in appellant's affidavit of merits, and stated to be, (1) that appellee did not sell appellant's goods on the authorized terms, prices and discounts; (2) that he did not sell $75,000 worth of appellant's goods "during the first year," as called for in the contract; (3) that he made sales to persons whose credit had not been previously approved by appellant; (4) that he made "special offers" and sales without the sanction of appellant, and (5) that he failed to account for $157.84 given to him "to redeem postal cards."

As to the second ground alleged, it is enough to say that the first year of the contract had not ended, and, besides, the record contains enough to warrant the inference that appellant waived such provision.

As to the third ground, it is enough to say that it is not supported by competent proof. The only thing we find in the record relating to it is an assertion in one of appellant's letters to appellee that sales made to two firms were contrary to instruct-

ions and that they had been charged to his account. We find in the abstract no other reference to the matter except that these accounts were first charged to appellee and subsequently collected and credited to him, and no affirmative proof of what instructions were given or how they were violated.

As to the fourth ground, the only evidence we find tending to support the contention is that a sale was made to Reid Murdock & Co. of Chicago, of 100 pounds of Eagle Chili Powder at 1¢ below list price, f.o.b. Chicago instead of San Antonio, and at an alleged unauthorized discount of 2% if paid in ten days, and which appellee claimed was an error. The whole matter involved only $3.37, and was unknown to appellant at the time of the discharge. With the sale he gave twenty cases of beans free for which it is claimed he had no authority. The sale was made April 10th, but on April 6th, appellant had written to appellee, saying:

> "We see no reason why we could not make a deal in your territory to include twenty cases beans free on 100 cases assorted products, that is Eagle Chili con carne and Eagle Chili powder. On this kind of a proposition, you could make up any kind of a combination you saw fit, so long as the jobbers would be willing to supply the free goods out of their shipments."

Appellant claims these were not "assorted products," but in view of the authority given to make up "any kind of a combination" appellee saw fit, we think he was justified in construing it to authorize the transaction. At any rate a misconstruction of an ambiguous letter would hardly justify his discharge.

As to the fifth ground, the proof tended to show that appellee accounted for the cash put into his hands to redeem the postal cards, and there was no competent proof of his failure to redeem said cards.

In support of the first ground of complaint, we are cited to about a half dozen different transactions out of 513 items in appellee's total sales, involving less than $50 out of over $21,000 in the aggregate. The complaint made with respect to

these several transactions is that appellee "guaranteed the sales." In the first place, there was no proof of a guaranteed sale in most of the instances cited other than the incompetent proof in the letters as aforesaid. In a letter of January 12, 1912, appellee informed appellant of a guaranteed sale but the record discloses no objection made thereto. There was also evidence that in December, 1911, or January, 1912, he made a "guaranteed sale" to the Meyers Grocery Company of Chicago, amounting to $57. In view of the existence of the custom to make "guaranteed sales" at the time the contract was entered into and its express provision for sales on the "terms, prices and discounts now granted to the trade," and no evidence of a change as to such terms, etc., before said sale, or complaint prior thereto, we do not deem such sale a violation of the contract. The only other direct proof we find in the record tending to show a guaranty was the introduction of the original and duplicate order of a sale made by one of appellee's salesmen to the Cincinnati Wholesale Grocery House. The duplicate contained the words "sales guaranteed," and it was claimed at the trial that these words were erased from the original. There was no evidence that appellee authorized the guaranty, if made, or knew of it. Even appellant did not know of it at the time of discharge, and nothing was lost by it as the bill was paid in full. It was a matter properly left to the jury. We find no adequate proof of guaranteed sales in the other instances cited, especially after appellee received anything in the nature of caution against such sales.

Nor do we find satisfactory proof in the record of anything in the nature of disobedience to instructions or wilful departure therefrom, in fact anything that furnishes legal justification for the discharge. Appellee was struggling to build up a new business in a new territory for future rather than immediate profits, and although appellant complained that it lost money

through its advertising schemes and professed a willingness to abandon the territory as unprofitable, yet the record shows that soon after appellee's discharge it established a new office in Chicago and took control of the territory and business it had contracted to give him. We think the frailty of the proof adduced in support of appellant's contentions and the trivial character of many of the complaints, resulting in no or inconsequential loss, were calculated to raise the question of appellant's good faith in making the discharge, and that the jury were justified in the conclusion that there was no substantial proof of departure from instructions or breach of contract by appellee.

As to the measure of damages, appellant contends that as appellee's compensation was based on his commissions, what he might earn therefrom during the unexpired term of his contract was too remote, uncertain and speculative to be capable of proof, and that damages should have been confined to proof of commissions earned before and owing at the time of the commencement of the suit. Appellee was to receive a commission on the goods actually sold, pay his own expenses, employ his own men, and maintain his office at Chicago at his own expense. Appellant's only liability was for a commission based on a percentage of sales actually made by appellee, and its obligation to advance appellee $50 each week for six months to be deducted from the commission account. As appellant was introducing new commodities into a new field, the contract could not have been expected to be remunerative until sufficient time had elapsed to establish the trade. The term of service contracted for was five years with the option to appellant to terminate the contract in two years. Appellee, having been wrongfully discharged and deprived of the benefits of efforts made for future earnings, the question is, under such circumstances, what was the measure of damages.

Appellee contends for the application of the rule laid down in C. C. C. & St. L. Ry. Co. v. Wood, 189 Ill. 352, that, "When profits are the object and inducement of the contract, and known to both contracting parties so to be, such profits may be proven as the measure of damages for a breach of contract if susceptible of being proven with reasonable certainty." In that case the damages claimed were for the failure of the lessor, railroad company, to stop its trains at the hotel of the lessee on its right-of-way as it had agreed to do in the lease. The court said:

> "When an established business has been interrupted or destroyed, the profits which the business yielded before such interruption or destruction may furnish a basis of fact on which to determine the profits of which the proprietor of the business has been deprived, or in some instances the volume of the business and the profits flowing therefrom are of such nature that the profits may be proven with a reasonable degree of certainty. In such state of case, when the action is for the breach of a contract such as the one at bar, the prospective profits of the business may be adopted as the proper measure of recovery."

This rule of damages is recognized in Chapman v. Kirby, 49 id. 211; Landis v. Wolf, 205 id. 393, and Ill. Cent. R. R. Co. v. Byrne, 205 id. 9, and in other jurisdictions. (Wakeman v. Wheeler & Wilson, 101 N. Y. 205; Bagley v. Smith, 10 N. Y. 489; Wells v. National Life Assn., 99 Fed. 833; Emerson v. Pac. Coast & Norway Packing Co., 98 Minn. 1; Richey v. Union Central Life Ins. Co., 140 Wis. 486; Hichborn v. Bradley, 117 Ia. 130.)

In the Wakeman case, supra, the court said:

> "Most contracts are entered into with a view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rule of damages, to determine the compensation to be awarded for the breach."

Similar language is used in Richey v. Union Central Life Ins. Co., supra, where the action was for damages for breach of a

contract providing compensation by commissions as in the case at bar. In that case the complaining party was permitted to show the amount of business he did during the first two years of the contract period; what he had done with reference to enlarging and increasing the business for the remaining years of the contract, and the money invested, and it was held that such proof afforded sufficient basis for estimating damages. In Hickborn v. Bradley, supra, referring to future profits it was said: "Although such a measure of damage may be unsatisfactory and uncertain, yet if it is the most satisfactory and certain measure which is attainable, justice is not to be defeated because a better measure is not at hand."

The judgment here is for $1500. Damages to that amount were shown to a reasonable certainty. The record shows that appellee's commissions exceeded his expenses, bringing him an average profit of about $80 per month for the six months the contract was in force. Using that as a basis for legitimate estimate, his commissions for the remaining eighteen months would have amounted to about $1400. There was also a balance due him for commissions unpaid of from $236 to $289. There was proof also of expenditures of over $150 for office equipment. If the proof was not sufficiently certain to warrant the amount of the verdict, it unquestionably was to warrant the amount of the judgment.

Several instructions are complained of. It is contended that plaintiff's second instruction sanctioned a misjoinder of claims, by telling the jury that the determination of the question as to whether there were commissions due for sales actually effected by plaintiff before the termination of the contract, was not affected by the question whether the contract was rightfully or wrongfully terminated. As above stated there was a balance due plaintiff for commissions at the time the contract was terminated which defendant refused to pay, and failure to pay the same

was one of the breaches of the contract for which recovery could be had in the suit.

It is claimed that by another instruction the question whether the contract was rightfully or wrongfully terminated was improperly submitted to the jury. If so, appellant is no position to complain as one of the instructions given at its request submitted the same question. It is also claimed that said instruction was improperly restricted in that it was calculated to lead the jury to believe that appellant could not terminate the contract for violation of reasonable instructions. If it be subject to such criticism, yet we do not think there was sufficient evidence in the record to raise the claim that appellee violated any specific instructions.

Nor, in view of the record, do we think the fourth instruction complained of misled the jury in stating that defendant could not set up as ground for discharge a breach of the contract which it had previously waived.

The complaint made against the seventh instruction relates to the rule laid down for the measure of damages which we have already stated was applicable to the case.

We have examined each of the other instructions complained of, and do not think them erroneous or misleading, especially in view of the state of the record.

It is complained that proof of the custom that obtained in appellant's business of making "guaranteed sales" at the time of entering into the contract, was improperly received. As before stated, inasmuch as the contract authorized sales upon the terms granted to the trade, it was competent to show that a guaranty was included in the terms.

It is claimed that certain letters received in evidence were inadmissible. A letter from appellant, referred to as "Ex-

hibit 23," is claimed to be a proposition for a compromise. We do not so regard it. But it was competent to show an admission of the amount due on commissions and for other purposes. Each of the letters criticized was admissible for certain purposes and the effect to be given them was not improperly stated in the instructions.

An attachment in aid was sued out in the case, and it is claimed that the Municipal Court had no jurisdiction to issue a writ of that character in a case of the first class or where the damages are unliquidated. Under Sections 19 and 28 of the Municipal Court Act the practice in first class cases, which includes suits for breach of contract, is the same as in similar cases in the circuit courts, except as has otherwise been prescribed as therein provided for, and Sec. 31, Ch. 11, R. S. authorizes an attachment in aid in "any action of assumpsit," etc., without any such restriction as appellant claims. Sec. 28 aforesaid also recognizes that the practice as to attachment obtains in first class cases.

The judgment is affirmed.

AFFIRMED.

ober Term, 1913. No.
17 - 19328

1032

AMERICAN MULTIGRAPH SALES COMPANY,
Defendant in Error,

vs.

GLOBE MUTUAL LIFE INSURANCE ASSOCIATION,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 17

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record before us is that of an action to recover the purchase price of a multigraph machine and certain accessories. Plaintiff in error sought to avoid payment on the ground that it did not comply with a certain warranty.

The contract contained the words, "Machine warranted to do work as sample attached." The sample was one of plaintiff in error's circulars printed on both sides. With the machine was sold certain loose type. It would print both sides of a circular as shown by the sample with electrotype but not with loose type, and plaintiff in error's claim is that the warranty related to the use of loose type and not electrotype.

It is unnecessary to consider whether or not the warranty contemplated the use of loose type or electrotype, inasmuch as plaintiff in error kept and used the machine from the date of the delivery thereof in December, 1911, up to and including the time of the trial in January, 1913, and employed it for other purposes than that referred to by the warranty. Under such a state of facts, we think the acceptance and use of the machine was a waiver of its inability to print both sides of the circulars with loose type, and that even if the warranty related to the use of loose type, it was not such as to survive acceptance. No other question is argued by plaintiff in error, and, therefore, the judgment will be affirmed.

AFFIRMED.

1871 I.A. IV

1037

October Term, 1913. No.

[illegible]

PIERCE B. PONTIUS,
Defendant in Error,

vs.

COMMERCIAL NATIONAL SAFE DEPOSIT COMPANY, a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 20

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment rendered for personal injury to a passenger in an elevator operated by plaintiff in error. The negligence averred was that the elevator and its attachments and appliances were allowed to become and remain out of order and in an unsafe and dangerous condition and that there was a lack of skill and negligence in the operation thereof.

The cause of the accident, as testified to by one Dyer, an employe of plaintiff in error, called as a witness for defendant in error, was that an automatic valve, described as being in the basement between the cylinder and main operating valve, "broke loose and fell out on the floor," causing the water to be discharged and the car to come down. On cross-examination he testified that he had charge of the mechanical part of the elevators; that it was his business to keep them in repair and "to inspect a little"; that it was usual for him "to look over the valves quite often to see that they were all right," but in what manner he did not state; that inspections were made by insurance and city inspectors, but the nature thereof, when made, or the results thereof were not shown; that what caused the valve to drop out was that it became unscrewed from the connecting arm,

that he could not have foreseen it unless he "took the valve off - that is, disconnected the valve and pulled the valve out." When asked, "Could that have been avoided, in your opinion?" he answered, "Well, it could have been avoided if I had had any idea that there was any danger of the valve dropping out, but to do that I would have to take the valve apart." But, as to whether any precaution was taken or should have been taken against the happening of such a condition, the record presents information too meager for the basis of an intelligent opinion. From it, no one can tell whether such valve should, from time to time, have been taken out and examined or not. The court and jury could not take judicial notice of the intricacies of mechanical construction. The record contains nothing that gives an adequate idea of the construction of the machinery in question, or the character of inspections made, or required, and it is insufficient to raise a palpable inference, as contended, that it was a latent or structural defect which an ordinary inspection would not disclose.

The negligence, if any, was manifestly a failure to inspect. From the burden of proving it, defendant in error was relieved. The nature of the case was such that negligence would be presumed from the happening of the accident, (Hartford Deposit Co. v. Hollitt, 179 Ill. 223; Steiskal v. Marshall Field & Co., 238 id. 92), and such presumption would obtain until overcome by evidence that the accident described could not have been foreseen or forestalled by reasonable inspection or the exercise of that high degree of care which the relation of the parties cast upon the plaintiff in error. There being no proof of that character, and nothing in the description of the accident or the cause thereof, from which the exercise of such care could be inferred, or that excused such an examination as would have disclosed the defect in question, or that supports a conclusion that the defect was latent, or that the accident was due to defective construction,-

plaintiff in error failed to rebut the presumption of negligence from the happening of the accident.

It is complained that one of the instructions was erroneous. We think it was faulty, but the record does not show any objection or exception thereto.

Complaint is also made of the refusal of the court to strike out an expression of opinion by defendant in error's attending physician, to the effect that he found a very painful spot over the lower part of the spinal column, because such symptom was subjective. The motion did not point specifically to such evidence, but, if it had, we do not think this error alone is sufficient ground for reversal.

We cannot say that the damages, $475, were excessive for the time lost and suffering endured by defendant in error as shown in the record.

The judgment will be affirmed.

AFFIRMED.

October Term, 1915. No.

113 - 19496

THOMAS STORCH,
Defendant in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 22

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Storch, who was plaintiff below, recovered a judgment of $500 for personal injuries received while he was alighting from plaintiff in error's car on which he was a passenger. The negligence charged in his statement of claim was that defendant started the car suddenly as he attempted to alight. The only question necessary to consider is whether the verdict was against the manifest weight of the evidence. We think it was.

Plaintiff was the only witness to testify that the car had stopped before he attempted to alight from it. Against his version was the direct evidence of the conductor and of a person who was waiting to take the car at the corner where plaintiff was to get off, that he stepped off the car before it came to a stop, or even to the usual place of stopping. This was corroborated not only by the testimony of the motorman that he made but one stop, which was at the usual place, and that the accident had happened before the car started again, but also by the testimony of a witness for plaintiff which tends strongly to show that plaintiff stepped off the car while it was slacking up and before it came to a stop at the street crossing where both of them were to alight. Plaintiff was not corroborated in any material particular. Upon such state of the record the judgment must be reversed.

REVERSED WITH FINDING OF FACT.

112 - 19408

THOMAS STUDDS,

Defendant in error,

vs.

Plaintiff in error.

October Term, 1913. No.

165 - 19554

S. F. SAYRS,
Defendant in Error,

vs.

JOHN YANGAS and E.F. THOMPSON,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 23

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This record presents for review proceedings in the Municipal Court in a suit against the plaintiffs in error, Thompson and Yangas, as principal and surety respectively on a stay bond given in a case in this court wherein a judgment for rent and possession of premises was affirmed.

All of the questions raised have been definitely settled. The first urged is that the court should have empaneled a jury to assess damages, defendants having demanded a jury on entering their appearance. Default was taken against each of them for want of a sufficient affidavit of merits. No specific demand, after default, for a jury to assess damages was made. This court is committed to the view that in such a case the party is not entitled to a jury to assess damages. (Saunders v. Fox, 178 Ill.App. 308; Second National Bank, etc., v. Claney, id. 427.)

It is next urged that it was error to strike the affidavitsof merits from the files because they stated proper matters of set-off and recoupment. They presented a set-off for the value of improvements made on said premises. This was not a proper defense to an action on a bond, and it was so held in Keegan v. Kinnare, 123 Ill. 280, in a similar action where a similar defense was sought to be made.

Complaint is also made that judgment having been entered against one of the defendants on April 28, 1913, it operated

to release the other from further liability; but the judgment was vacated on May 6th following, within thirty days from the entry of said judgment, which the court had the unquestioned power to do, (People v. Wells, 355 Ill. 450) and a joint judgment was then properly entered against them.

We find no errors in the record.

AFFIRMED.

187 I.A. 24

train known as No. 8 approached upon the "northbound" main track. Boeun, evidently realizing the dangerous position in which the [illegible] girls were, rushed to them and attempted to protect them either by getting them into the space between the "northbound" and "southbound" tracks or by pulling them over the "northbound" track upon which train No. 8 was approaching. He was unsuccessful in this, and he and plaintiff's intestate were struck by No. 8 and lost their lives.

Mary Fleming, testified that the gates were down, that she heard no signal or warning before the train came on her, that she had crossed with the intestate four or five times a week for nearly a year and knew that trains were liable to [illegible] at any moment; that they could not get across before the "southbound" train got there and made no attempt so do so. She further says that there was a space between 30 and 35 feet between the edge of the cars that were standing on the first track and the south rail of the track the train known as No. 8 came in on, that we may walked this distance they could have looked west and had a clear and unobstructed view of the train. She was asked whether she looked, and she said she guessed she did, that she did not see the train; that she did not ask Julia Varney, the intestate, whether she looked, and that she could not say that she saw her companion turn her head to the west. She further testified that the two had been standing in the space between the tracks about [illegible] seconds before the train known as No. 8 came, and that she did not hear anyone call to them "look out for that train", that they did not step from the time they passed under the [illegible] gate until they got to the place where they stood as stated.

Another witness, who was a discharged employe of the defendant, testified in behalf of the plaintiff that the track on which the [illegible] known as No. 8 was coming in from

west was straight for nearly a mile from Kalzia avenue; that "you could see right down the track and see the train coming if you looked"; that it was a clear, cold day; that Mary Fleming and the intestate did not look toward the train that was going down the track; that he did not see them turn their faces in that direction, and would have seen them if they had done so, that "they walked right straight onto the track and were struck." He further testified that the bell on No. 8 was ringing and that the engine sounded a danger signal when it was 500 feet from the crossing.

The testimony of seven witnesses was offered by the defendant upon the occurrence. The substance of their testimony is, with reference to the point which we deem to be decisive of the case, that the girls came across the tracks and did not look in either direction but looked straight ahead. Some of the witnesses testified that the girls when standing between the two tracks appeared to be talking to each other. The witnesses who looked saw the train. Pecan, who remained at the gate, also must have seen the train, as he hurried to the girls and attempted to protect them.

There is contrariety of testimony as to weather conditions, the alleged fact that on account of the great number of passing trains the gates were down a large part of the time, the speed of the train, etc., but we find nothing in the record to indicate that the intestate was in the exercise of due care for her own safety. The burden was on the plaintiff to prove this necessary allegation of the declaration. On account of the failure to make such proof the judgment must be reversed.

REVERSED.

October Term, 1913. No.

20 - 19385

MAYER J. DeZEICHNER,
Defendant in Error,

vs.

LAMM & COMPANY, a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 25

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit is based upon the following contract entered into between the parties:

"AGREEMENT made and entered into this first day of June, A. D. 1911, by and between LAMM & COMPANY, a corporation doing business in the City of Chicago, party of the first part, and MAYER J. DE ZEICHNER, now of the City of Chicago, party of the second part, WITNESSETH:

"WHEREAS, the party of the first part is engaged in the business of manufacturing and dealing in men's clothing and has a factory at the City of Chicago, and is desirous of employing the party of the second part as a designer and manufacturer, and

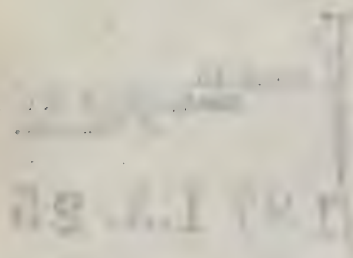
"WHEREAS, the party of the second part is a designer and manufacturer of men's clothing and is desirous of entering the employ of the party of the first part,

"NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for and in consideration of the sum of One Dollar, lawful money of the United States, the receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants and conditions hereinafter expressed, the parties to these presents agree:

"FIRST: The party of the first part hereby engages the services of the party of the second part as a designer and manufacturer in the business conducted by it for a period of one year from the date of this agreement, that is to say up to May 31st, 1912, and for such further time as is hereinafter provided for.

"Second: The party of the second part hereby accepts such employment and agrees to devote his entire time, skill, energy and attention and the best of his ability as such designer and manufacturer in the business of the party of the first part.

"THIRD: The party of the second part, during the time of his said employment, shall have full and exclusive charge of the mechanical branch of the business of the party of the



first part; shall have full and exclusive charge of the designing and cutting and manufacturing of the men's clothing; shall originate the styles and designs, and in creating styles shall take into consideration the suggestions as to weave and style made by the party of the first part.

"FOURTH: The party of the first party shall furnish to the party of the second part all facilities required by the party of the second part in the performance of his said duties, and the party of the second part shall have full and exclusive authority to engage or discharge such employees as may be necessary to be employed in the manufacturing department of the party of the second part, due regard always being had to the welfare and best interests of the party of the first part.

"FIFTH: As and for compensation for the services so to be rendered by the party of the second part to the party of the first part, the party of the first part agrees to pay to the party of the second part the sum of Ten Thousand Dollars ($10,000.00) per annum, payable in equal monthly installments of Eight Hundred Thirty-three Dollars and Thirty-three Cents ($833.33) on the first day of each month, the first installment to be paid to the party of the second part the first day of July, 1911.

"SIXTH: The party of the second part shall be allowed vacation for a period not exceeding two weeks in the aggregate, whenever the condition of the business of the party of the first part may warrant his so taking vacation. No deduction is to be made from the salary of the party of the second part on account of such vacation.

"SEVENTH: At the expiration of the term of one year, the said employment shall not terminate but this agreement shall continue in force and effect thereafter, subject, however, to the right of either party to terminate said employment by giving to the other party three months' previous notice in writing of its or his intention so to terminate the same, and said employment shall terminate at the end of three months from the time of giving such notice.

"IN WITNESS WHEREOF," etc.

The plaintiff testified that he began work on the third Monday in June and continued to work until October 8th. He was paid up to October 1st, in accordance with the terms of the contract. On October 8th he fell sick and was confined to his bed for about three weeks. On November 8, 1911, he reported for duty but was not set at work, the defendant, about two weeks prior thereto, having re-engaged a designer who had worked for it prior to the employment of the plaintiff. A formal letter was sent by the plaintiff to the defendant, stating that he had recovered from his illness, was ready to proceed with the contract on his

-2-

part, and demanding fulfillment by the defendant.

The claim made by plaintiff in his statement was for salary at the rate of $833.33 a month, from October 1, 1911, to October 8, 1911; the amount due under this claim was "estimated at $308.33." Second, salary at the same rate per month, from November 6, 1911, "until such time as said contract may be terminated as therein provided. The amount due under this claim of damages is estimated at about $8,125."

The defenses set up are, that in obtaining the contract the plaintiff deceived the defendant as to his previous experience and as to his competency; that the plaintiff was incompetent, and was discharged for that reason. It is also claimed by the defendant that the plaintiff was discharged because he failed to appear at defendant's place of business during the period from October 8th to November 6th, owing, as it is said, to a "nervous breakdown due to his failure to comply with his contract," and that defendant was required to employ and did employ another man to go on with plaintiff's work.

There was a trial before the court, and a finding and judgment entered in favor of the plaintiff in the sum of $5,849.98.

In the effort to establish its contention that the plaintiff was incompetent, the defendant took depositions of many of its customers as to the character of the clothing received by them respectively from the defendant while plaintiff was in charge of the manufacturing under the contract. It would seem that the business of the defendant is what is known as "tailor to the trade." Garments are designed in various sizes and sent to the retailers, as we understand it, not wholly made up, but in such condition as to "out lets," etc., that they may easily be altered to fit a purchaser. The testimony of the retail dealers referred to was for the most part not admitted by the court. The depositions of one

of these witnesses, which apparently favored the plaintiff, was offered by the plaintiff and received over the objection of the defendant. We think the testimony of the other witnesses should also have been received. It tended to show incompetency on the part of the plaintiff. Under the terms of the contract plaintiff was to act not only as "designer" but also as "manufacturer" for the defendant. Under paragraph three he was given "full and exclusive charge of the mechanical branch of the business," and under paragraph four he was given "full and exclusive authority to engage or discharge" employees, etc. The position was one evidently of great importance, and it is urged by the defendant that the evidence in the case so thoroughly demonstrated the incapacity and incompetency of the plaintiff that a judgment should be rendered in this court for the defendant. In contracts for personal service the incompetency of the employee to perform the service which he has undertaken is a sufficient ground for discharge, though he was hired for a definite period. 20 Am. & Eng. Ency. 28.

For the error pointed out the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

67 - 19449

1039

ROBERT PORTER, a minor, by CORA PORTER, his next friend, Defendant in Error,

vs.

CHICAGO CITY RAILWAY COMPANY, Plaintiff in Error.

Error to Municipal Court of Chicago.

187 I.A. 28

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The writ of error in this case brings up for review a judgment for $500 entered in favor of the defendant in error (plaintiff) in a suit for personal injuries alleged to have been sustained through the negligence of the plaintiff in error (defendant).

The plaintiff, who was about ten years of age, testified that the accident occurred at the intersection of 70th street and Wentworth avenue, in the city of Chicago; that he, with his mother, had taken the northbound car of defendant at 75th street and that he alighted at 70th street. His description of the manner in which the accident took place is as follows: "The car stopped when I got off on the north side of 70th. I got off the car and went around the back of it, and went across when the car hit me. I was going across the street. When I got off the car I was walking west. I was not going over towards the school house. The school house is at 75th and Harvard. When I got off of that northbound car I walked right back of that car, right over to the south tracks, and I was going on across the street there. This car came along, the south-bound car, came along and struck me. I did not see the car before it struck me, no sir. I did not hear any bell sounded at that time."

Two other witnesses, who were passengers in the car,

testified for the plaintiff, one of whom said that the car was going "fast," and the other that it was going about the speed of the average street car that she rode in. A third witness, who lived near the scene of the accident, said that the car was coming "real fast." She further testified that she lived on the west side of the street, about 100 feet north of 70th street, and from the window from which she looked she could see the side of the car; that after the car struck the boy it ran about 15 feet. The motorman, testifying for the defendant, said the car ran about 12 feet and that it was going about four miles an hour.

There is no proof that the boy was in the exercise of any degree of care. After the northbound car on which he was riding had stopped at 70th street and he had alighted, he undertook to cross the southbound track, apparently without looking or in any manner attempting to ascertain whether he could do so in safety. That this constituted contributory negligence has been many times decided. From the undisputed facts in this case we are of the opinion that the court should have directed a verdict for the defendant on the ground that the plaintiff was now shown to have exercised due care. In a personal injury case where the facts are undisputed and but one reasonable inference can be drawn therefrom, the question of contributory negligence, as well as the question of negligence, becomes one of law for the court. Heimann v. Kinnare, 190 Ill. 156; North Chicago St. R. R. Co. v. Coesar, 203 Ill. 608; Burke v. Chicago City Ry. Co., 155 Ill.App. 388; Ohnesorge v. Chicago City Ry. Co., 255 Ill. 424.

The judgment is reversed.

REVERSED.

October Term, 1913. No.

84 - 19486

1040

JOHN COLLINS, a minor, by James Collins, his next friend,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO and ZUTTERMEISTER ICE COMPANY,
Defendants in Error.

Error to
Circuit Court,
Cook County.

187 I.A. 30

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Plaintiff in error in 1904, then a boy of nine years of age, with three other boys got up on the rear step of one of the ice-wagons of the Zuttermeister Ice Company, as the wagon was about to move off after making a delivery of ice. The wagon was enclosed and had a wooden partition, in which there was a small opening, back of the driver's seat, extending across the wagon and from the floor to the top of the wagon. At the time the boys got upon the wagon there were two drivers, or a driver and his helper, upon the driver's seat. So far as the record shows, these men knew nothing until after the accident of the presence of the boys upon the wagon, although there is some testimony in the record tending to show that the boys asked if they might ride, but it is not shown that either of the men on the seat of the wagon heard the request. The wagon in question was followed by another wagon of the Ice Company. After going some distance one of the wheels of the first wagon, it is claimed, went into a hole in the street. The plaintiff fell to the pavement and was run over by the second wagon and injured.

Suit was brought against the City and the Ice Company, the declaration charging the accident to be due to the negligence of the City in permitting Morgan street, on which the accident occurred, to be out of repair, and the alleged negligence of the Ice

Company in driving its wagons upon such street at a high and dangerous rate of speed. At the close of all the evidence the court directed the jury to find a verdict in favor of the two defendants. To reverse the judgment entered upon this verdict this writ of error is prosecuted.

We think the instruction was proper. Even if the driver of the first wagon had known that the boy was upon the wagon, his permitting him to ride there would have been an act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work. Such an act is not deemed to be the act of the master. Chicago Terminal Transfer R. R. Co. v. Schiavone, 216 Ill. 275. But as heretofore stated, the record does not show that the driver knew the boy was upon the wagon. Nor is any negligence shown on the part of the driver of the second wagon. Plaintiff's witnesses testified that the front wheels of the second wagon were about opposite the rear wheels of the first wagon. Robert Wagner, for the defendant, testified that he was the teamster on the front ice-wagon; that one Schultz was with him; that Schultz at the time of the trial was dead; that Ed. Coggins was driver on the rear wagon; that the last stop was made at 5014 Aberdeen street, and that when he came out no boys were on the wagon; that he drove east to Morgan street on a slow trot, then turned north on Morgan street on a slow trot; that he heard Coggins "holler" but did not then know that anybody was on the rear of his wagon; that there was a wooden partition behind the driver's seat to hold the ice in; that when he heard the "holler" he stopped, got off and went back to the other wagon and picked up a boy there lying on the street two or three feet behind Coggins' wagon; that the second wagon had stopped; that he did not see any of the boys at all up to the time of the accident, and that his horses never went faster than a slow trot.

This testimony of Wagner as to where the boy was found is not denied by any witness, and from it it clearly appears that the wagon could not have been going at the high rate of speed testified to by some of the witnesses for the plaintiff, because it appears uncontradicted that the wagon was stopped within a very few feet after the boy had been run over. There was no evidence tending to show that after the boy fell to the pavement Coggins could have stopped his team in time to prevent the accident. In addition to this uncontradicted evidence, which we think tended to show no negligence on the part of the Ice Company employees, the record does not disclose that the plaintiff made proof of the necessary allegation in his declaration that he himself was not guilty of contributory negligence.

It has been held in many cases that where the person injured, as in the present case, is a trespasser, the owner of the vehicle owes no duty to him other than not to injure him wantonly or wilfully. Hebard v. Mabie, 98 Ill. App. 543; Belt Ry. Co. v. Chalvers, 133 Ill. App. 332; Kerins v. Anderson, 175 Ill. App. 377.

In our opinion it cannot be said that the defective condition of the street was the proximate cause of the accident. For aught that appears in the record the driver might easily have avoided the hole, if there was a hole in the pavement. As we understand the record there were two boys on the wagon at the time the plaintiff fell; the other boy was not thrown. It is clear from the record that the boy was "stealing a ride" and the accident must be attributed to his own negligence.

The judgment is affirmed.

AFFIRMED.

October Term, 1913. No. 1041

98 - 19482

JOE C. HERMANN,
Defendant in Error,

vs.

FELIX UHRY, doing business as F. UHRY & CO.,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 32

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for $245 in favor of the defendant in error, plaintiff, and against the plaintiff in error, defendant. Suit was brought for damages alleged to have been suffered by the plaintiff by reason of his wrongful discharge by the defendant.

The contract for services was in writing, being made September 14, 1912, by its terms to end September 14, 1913. Commissions on sales of ten percent. were provided for. The contract has these additional provisions:

> "Party of the first part agrees to allow party of the second part a drawing account of twenty-five dollars ($25.00) per week and an additional thirty-five dollars ($35.00) on the first day of every month during the term of this contract, same to be charged against the before mentioned commissions.
>
> "The aforementioned drawing account is to terminate if the party of the second part becomes incapacitated either by illness or accident and to be resumed again on his entering upon his duties; said party of the second part being amply provided with sickness and accident insurances.
>
> "The party of the first part agrees to make a settlement in full with party of the second part on or about January 1st, on or about July 1st and upon termination of this contract."

It would appear that from the date of the contract until November 16, 1912, plaintiff received weekly payments of $25.00 and additional monthly payment of $35.00, in accordance with the provisions of the contract. Plaintiff testified that on December 2nd, after having been called to Chicago by the defendant, he was told by the defendant that his services were no longer required.

We are satisfied from the record that the plaintiff was discharged without cause.

The second point in the case, and the one to which the brief and argument of the defendant are substantially directed, is as to the measure of damages by which the trial court fixed the amount of the finding and judgment. We think the proper construction of this contract is that the plaintiff was to be paid in any event $25.00 per week and an additional $33.00 on the first day of every month during the term of the contract. Three settlement days a year were provided for, and it was the evident intention of the parties at this time that if the amount of the commissions exceeded the amount advanced weekly and monthly in accordance with the contract, the plaintiff should be paid such excess. This is the construction given to similar language in contracts by courts of this and other states. In the case of Gannon v. Tyree, 148 Ill. App. 98, the language was: "guarantee to loan or advance to each of you the sum of $250 per month for one year," and in that case, as in this, the loans or advances were to be deducted from the commissions. In the case of Durante v. Raimon, 120 N. Y. Supp. 881, the language was: "allowing you a drawing account of $60 per week." Under this form of contract the court held that the employee was to be paid $60 per week in any event. In some of the cases allowances of the nature of that in question, or advances, as they are sometimes called, are said to constitute a minimum estimate of the value of the salesman's services and furnish a fair criterion and measure of damages:

On the whole case we think justice has been done between the parties by the judgment entered and it will be affirmed.

AFFIRMED.

October Term, 1913. No.

847 - 19641

SEAVER E. SWEEY, Defendant in Error,	)	
vs.	)	Error to Municipal Court of Chicago.
LORENZ GRUPCZYNSKI, Plaintiff in Error.	)	

187 I.A. 33

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment was entered in this case upon the finding of right of property in defendant in error, plaintiff, in a suit brought in replevin by him against the plaintiff in error, defendant, damages being fixed at one cent.

The parties had entered into a contract, in which the plaintiff was referred to as party of the first part and the defendant as party of the second part, for the sale of certain real estate and personal property, including the property recovered in the present proceeding, consisting of a horse, cash register, etc. The Contract referred to reads: "that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part" certain described real estate. Then follows: "And to sell and transfer one cash register," etc. The defendant assigned his interest in the contract to one Drabanski, except as to a portion of the personal property. The terms of the contract were not complied with by Drabanski or Grupczynski, the defendant, as to making payments and after recovering possession of the real estate and personal property obtained by Drabanski, the plaintiff hereby began this suit in replevin for the property retained by the defendant.

The one substantial question in the case is whether

or not the contract is one of conditional sale. We agree with the trial court that it is.

The plaintiff did not by this contract sell the property in question, but agreed that if the defendant should make payments and perform the covenants on his part he, the plaintiff, would sell and transfer it. The contract is not ambiguous. Payments not having been made under its terms, the plaintiff was entitled to re-possess himself of the property which had been delivered to the defendant, the interest of no third party having intervened.

The judgment is affirmed.

AFFIRMED.

October Term, 1913. No:
274 - 19670

CHICAGO TELEPHONE COMPANY,
Defendant in Error,

vs.

ELIZA HALEY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 35

PER CURIAM:

In this case there is nothing before us for review except the common law record in a replevin suit brought to recover a telephone equipment of the value of $14. It contains nothing but the replevin affidavit, writ and bond, the entry of defendant's appearance and the judgment order. The latter recites that evidence was heard, but it has not been preserved in the record. There being no irregularities on the face of the record, there is, of course, nothing for us to review.

The plaintiff in error undertook to handle her own case in this court, and, being manifestly unacquainted with its procedure, has neglected to preserve the matters of which she complains in any form recognized in an appellate tribunal. She has filed what is designated as an 'abstract', which contains nothing but her own statements of what took place at the trial. It is not an abstract of anything preserved in the record, and, therefore, we cannot consider the statements it contains. If plaintiff in error has been deprived of any legal right, she has unfortunately failed to present any question relating thereto in such form that it can be reviewed. We can do nothing but affirm the judgment.

AFFIRMED.

Supreme Court, U.S.
FILED

JUL 1 1957

JOHN T. FEY, Clerk

No. 85

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

ELLIS ARNALL,

Petitioner,

v.

HERMAN TALMADGE, GOVERNOR, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ELLIS ARNALL,
Petitioner,
Pro se.

tober Term, 1912. No.

163 - 18619.

NELLIE N. STAAT,
Defendant in Error,

vs.

WILLIAM H. COUCHENOUR,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

187 I.A. 36

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out to review an order of the Municipal Court overruling a motion of plaintiff in error to set aside a judgment by default entered in that court. The judgment sought to be vacated was entered May 3, 1913. Plaintiff in error had been personally served with summons in that case on April 11, 1913, and had been defaulted for failure to enter his appearance in pursuance to a rule so to do duly entered against him in that case, just two weeks prior to the entry of the judgment. He learned of the default the same day it was taken. On June 1, 1913, twenty-eight days after the judgment was entered, plaintiff in error filed in that court his motion to have said judgment set aside and filed in support of that motion his own affidavit, from which it appears that on April 17th, 18th and 19th, 1913, he was engaged in another branch of the Municipal Court in the trial of a contested case and that Mr. Dickinson, whom he "desired to retain" to try the case in which the default judgment was entered, was also on the same days busy trying that case. The affidavit does not show that plaintiff in error had employed Dickinson or any lawyer to represent him in the case when the default was entered, or that he had even spoken to any lawyer about that case. Neither does it show any reason why he had not hired an attor-

ney and had his appearance entered between the time he was served with summons and the 17th day of April, nor why he did not have his appearance entered and move to have the default set aside between April 18th, when he was defaulted, and May 3, when judgment was entered.

The record here presented, instead of showing diligence in the protection of his interest, affirmatively shows that plaintiff in error was woefully negligent in that regard. It is only where a meritorious defense exists and the default is not due to the negligence of the party defaulted that a judgment following such default will be set aside to let the party in to make a defense on the merits that by the exercise of diligence would have been presented before the default. Pleff v. Pacific Exp. Co., 281 Ill., 343-347; Gage v. City of Chicago, 311 Ill., 109-111-113; Eggleston v. Royal Trust Co., 305 Ill., 170.

The trial court did not abuse its discretion in overruling the motion to set aside the default and judgment. The order is, therefore, affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.
274 - 18736.

JOHN PETREY,
Plaintiff in Error,

vs.

JOHN A. BUSK and FRANK G. CLARK,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

187 I.A. 41

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court for something. The judgment of that court was that he take nothing by his suit. He then sues out this writ of error to have that judgment reviewed by this court. No errors assigned on the common law record are argued. There is nothing in the abstract of record or even in the argument of plaintiff in error to show what the statement of claim or affidavit of merits contained. We are, therefore, wholly in the dark as to what the issues were and can not determine whether the evidence supports the findings or not. This omission was called to the attention of plaintiff in error by the brief and argument of defendant in error, which was filed November 19, 1913, yet he has in no way attempted to correct the error. The rules of this court require an abstract of the record sufficiently full and accurate for a full understanding of the questions presented for determination. (See Rule 19.)

It has been pointed out by this court and by the Supreme Court of this state in cases without number that a reviewing court will never go to the record to find reasons to reverse a judgment and that when such reasons do not appear in the abstract the judgment will be affirmed pro forma.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

EFTHYMOS TOUNTAS,
Defendant in Error,

vs.

ANTONIUS MELIGIANNIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

187 I.A. 63

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment of the Municipal Court against plaintiff in error for $783.80 in favor of defendant in error for wages. The suit in the Municipal Court was begun against plaintiff in error and his brother, Nicholaos, as partners.

The statement of claim showed the demand of defendant in error to be for $548, earned prior to March 7, 1911, and then due, and for $365, earned after that date. In the affidavit of merits filed on behalf of both defendants the existence of the partnership is denied and it is averred that Nicholaos had nothing whatever to do with the matter. The affidavit of merits shows as a further defense that all of the wages earned by appellee prior to March 8, 1911, in the sum of $500 was paid to him in cash by plaintiff in error on that date, and that all the balance of the wages earned by defendant in error, together with much more money, had been paid and advanced to defendant in error or to others on his order, so that there was due from defendant in error to plaintiff in error at the time the suit was started $480. No claim for set-off was filed however. After this affidavit of merits was filed the case was discontinued as to Nicholaos, and all the papers in the case were amended accordingly, and the suit from thence forward proceeded against plaintiff in error alone.

In support of the claim of payment of the wages earned prior to March 2, 1911, plaintiff in error introduced in evidence the following writing:

"ACKNOWLEDGMENT AND RECEIPT.

"The undersigned Efthymios Tountas hereby acknowledge that I received from the Deligiannis Brothers and Vlahos Company the sum of money owed me, up to February 2nd, 1911, by the Company amounting to $518.82, which is a balance of wages due me for services rendered to said Company after the deduction of the amounts that I have received from said Company at different times up to above mentioned date.

"I also acknowledge that up to the said date I have not any other claim and not any against their former partner Nicholaos Vlahos.

"I also acknowledge that for my wages since the month of February, 1911, I have not any claim against Andrew Vlahos but against Antonius Deligiannis for whom I am working.

(Signed) Efthymios Tountas,

WITNESS: STRIKOS GIANNOPOULOS.

Dated Chicago, March 2nd, 1911."

Plaintiff in error also introduced other proof that at the time that writing was signed $518 was paid in cash. Plaintiff in error testified that he paid it, and that when he paid it his brother, Nick Deligiannis, was present. The witness, Nick Deligiannis, testified that he saw him pay it. Plaintiff in error also testified that about five minutes after he paid defendant in error the money Strikos Giannopoulos and Andrew J. Vlahos, a former partner of plaintiff in error, came in and that Giannopoulos read the receipt and asked defendant in error if he had received the money, and that he replied, "Yes I receive". Giannopoulos corroborates plaintiff in error in this respect. Vlahos, although called by plaintiff in error as a witness, failed to corroborate his testimony as to this conversation. On the contrary, he testified that he was present when the paper was signed and that no money was paid at that time.

Defendant in error testified that he received no money at the time the writing called a receipt was signed, and that he never at any time received any part of the $518.82

mentioned in the writing. Michael Andrianapoulos testified that he was present when the writing was signed and was where he could see what was going on, and that no money was paid to defendant in error at that time.

Andrew J. Vlahos, apparently a very intelligent Greek, a graduate of the University of Athens, when called as a witness for defendant in error, testified that he had been a partner of plaintiff in error up to February 3, 1911; that defendant in error had been an employee of that firm; that on that date the partnership was dissolved and plaintiff in error was to continue in business and defendant in error was to continue in his employ; that as a part of the terms of dissolution of the partnership plaintiff in error assumed the payment of what was due defendant in error, and defendant in error consented to look to plaintiff in error for his pay and to release the witness from all further liability therefor; that the writing in question was prepared by him for the purpose of showing that the liability of the firm, and of the witness as the retiring member of the firm, for the payment of the wages of defendant in error earned and to be earned was extinguished; that he so explained the writing to the parties at the time it was signed and that they signed it with the understanding that such was its import. The language of the writing itself seems to be in accord with the explanation of it made by the witness.

The admission of this evidence is not urged for error. The only grounds upon which a reversal of the judgment is asked is that the finding of the court is manifestly against the weight of the evidence, and as to that contention the argument is chiefly directed to the evidence of the claimed payment for wages earned prior to February 3, 1911.

The evidence was in hopeless conflict. Who should prevail in the suit turned on the question of which side told

the truth. The case was tried without a jury. The learned trial judge who heard all the testimony and saw all the witnesses evidently believed the witnesses for defendant in error, and disbelieved the others, for he found the issues for him. The superior opportunity of the trial judge for correctly measuring the credibility of the witnesses and weighing their testimony over that afforded a court of review, has often been commented on by courts and law writers and can hardly be overestimated. Out of that fact has grown the well understood rule that the findings of a jury, or of a trial judge hearing the case without a jury, should not be set aside by a reviewing court, unless the same is clearly and manifestly against the weight of the evidence. Lusk v. Throop, 189 Ill., 137; C. & E. I. R. R. Co. v. Hines, 183 Ill., 482. Such findings are usually conclusive. Klinger v. Commercial Mutual Fire Ins. Co., 90 Ill. App., 454.

We have carefully examined all the evidence in the record on the question of payments claimed to have been made for wages earned since, as well as those earned before, February 3, 1911, and are unable to conclude that the finding of the court is manifestly wrong. On the contrary, we feel that the finding complained of is fairly supported by the evidence.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.

1044

333 - 18800.

EMANUEL LEVY,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
a corporation,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

187 I.A. 64

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error received injuries when a street car of defendant in error, on which he was riding as a passenger for hire collided with another street car of defendant in error at a street intersection where the tracks on which the two cars were being operated crossed each other.

There is controversy over the extent of the injuries received and as to whether the collision was due to inevitable accident or to the negligence of the servants of defendant in error. The case was tried by a jury. The verdict was not guilty.

Plaintiff in error urges that the verdict is not in accord with the evidence on the question of the cause of the collision. Before this court can reverse a judgment for that reason we must be able to say that the verdict is manifestly and palpably against the weight of the evidence. That rule has been announced so frequently that the citation of authorities in support of it is useless.

The question of negligence is for the jury, unless from the evidence reasonable minds could come to but one conclusion. The negligence which it is claimed the servants of defendant in error were guilty of in this case was in failing to so manage the car on which plaintiff in error was riding as

to avert the collision. By the doctrine of res ipsa loquitur the happening of the collision raises the presumption of negligence on the part of those in charge of and operating the cars, and if resultant injury is established by the proof, a prima facie case is made out. When that prima facie case is overcome by the evidence, no recovery can be had on the mere proof of the happening of the accident. C. U. T. Co. v. Hee, 218 Ill., 9; C. U. T. Co. v. Leonard, 186 Ill. App., 144; Garner v. C. C. T. Co., 150 Ill. App., 149. When the collision is shown by the proof or is admitted and there is proof before the jury tending to show that it was the result of an inevitable accident and not due to the negligence of any one, it is for the jury to determine whether the prima facie case is overcome by the proof or not. C. C. Ry. Co. v. Purdy, 224 Ill., 334; Burgoyne v. C. C. Ry. Co., 167 Ill. App., 58.

There was in this case proof tending to show that the motorman did all in his power to avert the collision, but that it resulted from causes against which human prudence and foresight could not have provided. By the verdict the jury found, in effect, that the collision was due to inevitable accident. While a contrary verdict might have been sustained, a careful examination of the evidence convinces us that the verdict returned is not so manifestly against the weight of the evidence as to warrant us in awarding a new trial for that reason.

The only other question discussed by plaintiff in error relates to the measure of damages. In view of the conclusion we have expressed a discussion of this question could serve no useful purpose.

Finding no reversible error the judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.

394 - 16861.

LUDWIG M. BORGERSON, Appellant,
vs.
CHICAGO RAILWAYS COMPANY, Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

187 I.A. 65

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellant recovered in the Superior Court a judgment against appellee for $500. Not being satisfied with the amount recovered he has brought the record here for review.

The undisputed facts are that appellant was on the day in question a police officer and was engaged in conveying mail from the City Hall to the Austin and other police stations and in so doing was using a motorcycle as a means of transportation. Appellee has a double track street car line on North avenue, the north track being used for west bound cars and the south track being used by east bound cars. As appellant was riding westwardly on North avenue, he overtook a west bound car that was about to stop at the intersection of North avenue and North 47th avenue to discharge a passenger. He was riding between the rails of the west bound track. The space between the rails of the two tracks and between the two tracks was paved. The space between the outer rails and the curb line was not paved and was eight or ten inches lower than the surface of the pavement between the tracks. Appellant turned his motorcycle to the left on to the space between the two tracks with the purpose in mind of passing the car while it was standing still and then turning between the rails of the north bound track and continuing his journey ahead of the car. When in his effort to pass the car appellant was approaching the front end of it, a passenger came out of the left hand

door at the front or west end of the car and stepped to the street immediately in front of appellant, and so near to him that he was then unable to avert a collision. Appellant was thrown to the pavement and received severe injuries about the head and face.

Reversal of the judgment is asked because of error in the giving of several instructions at the request of appellee and because the damages awarded were grossly inadequate to compensate appellant for the injuries sustained.

All of the instructions complained of, except one, relate to the right of appellant to recover anything. On that issue the jury found for appellant. It is, therefore, manifest that appellant was in no way prejudiced by the giving of those instructions. Even if they were all erroneous, the giving of them was harmless error for which the judgment would not be reversed. Atlas Furniture Co. v. Higgins Carpet Co., 71 Ill. App., 17; Miner v. Armstrong, 29 Ill. App., 386; Squire Dingee Co. v. McDonald, 61 Ill. App., 607; Merry et al. v. Calvin, 139 Ill. App., 459. See also C. C. Ry. Co. v. Hagenbuck, 238 Ill., 280.

The other instruction complained of related to the question of proof of injuries "claimed" or "alleged" to have been received and of the duty of appellant to prove by a preponderance of the evidence that he "really" sustained the damages "claimed". As to this instruction, it is urged that the language used was misleading and cast a doubt on the bona fides of appellant's injuries and that it should not have been given where there was no dispute as to the "disability" suffered by appellant. An examination of the evidence in the record discloses that appellee did dispute by the introduction of evidence of expert witnesses some of the injuries and resultant damages claimed by appellant. Not only that, but appellant by the fourth instruction given by the court at his

request suggested doubt and uncertainty as to the same matters complained of in this instruction. Where a party induces the court to give instructions on a theory of the case, he can not complain that instruction on the same theory are given at the instance of his adversary. West Chicago St. R. R. Co. v. Buckley, 200 Ill., 280; Springer v. City of Chicago, 135 Ill., 552; Baker v. Fawcett, 69 Ill. App., 300. What is said in Day v. Campbell, 148 Ill. App., 86, 93, in relation to an instruction there numbered 18, is applicable to the instruction under consideration here. The instruction is not open to the criticisms here made.

The reason most strenuously urged for the reversal of the judgment is the inadequacy of the amount recovered to compensate appellant for the injuries and consequent loss suffered by him.

At the common law judgments in tort actions could not be set aside for that reason. While that rule has been relaxed in recent years, and the right to do so is now conceded in most jurisdictions, cases are rare indeed where courts have felt impelled to exercise that power. In most of the cases where new trials have been awarded for that reason, there has been a definite measure of damages by which the inadequacy of the verdict could be determined, and in all such cases the amounts recovered have been manifestly inadequate. In Hackett v. Pratt, 58 Ill. App., 348, cited by appellant, the court says:

"Where actual damages are shown with such definiteness as to furnish a reasonably certain measure, we think the rule is that the court may look into the circumstances proven and grant a new trial, if the amount awarded by the verdict is manifestly inadequate."

In Hamilton v. P. C. C. & St. L. Ry. Co., 104 Ill. App., 307, also cited by appellant, the court said:

conclusive. We feel that the evidence would have justified a larger verdict, but that fact alone will not justify awarding a new trial. Levett v. City of Chicago, 35 Ill. App., 570; Harrer v. Black Diamond Coal Co., 143 Ill. App., 594; Dow v. Koehler, 65 S. W. (Tex.), 1088; Dowd v. Westinghouse Air Brake Co., 133 Mo., 579; Caswell v. North Jersey St. Ry. Co., 69 N. J. Law, 276; Reger v. Rochester Ry. Co., 37 N. Y. Sup., 580; Lancaster v. Providence & S. S. S. Co., 26 Fed., 233; Berry v. Lake Erie & W. R. R. Co., 72 Fed., 486; Robinson v. Town of Waupaca, 77 Wis., 544.

After a careful consideration of this record we are unable to say that the verdict is so disproportionate to the damages proven as to warrant us in awarding a new trial for that reason, or to indicate that the jury were influenced by passion, prejudice or other improper motive.

Finding no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.
434 - 18904.

MEYER, HESS & COMPANY,
Appellees,

vs.

J. H. WAY, trading as WAY MUFFLER COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

187 I.A. 67

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is a suit originally instituted before a justice of the peace by appellees, co-partners, doing business as Meyer, Hess & Co., against appellant, J. H. Way, doing business as Way Muffler Co., to recover damages alleged to have been occasioned by the failure of appellant to deliver to appellees certain mufflers which appellees claimed to have purchased from appellant. Upon the second trial of the case in the Circuit Court, on the appeal of appellant, there was a finding and judgment against appellant for $149.38. A judgment against appellant for $196 recovered at the first trial was reversed on appeal to this court for the reason that the alleged contracts of purchase and sale were unintelligible, and there was no evidence in the record explanatory of the same, and for the further reason that there was no evidence tending to show that one of said alleged contracts was ever accepted by appellant.

In 1901 and for several years prior thereto, one Willis F. George was acting as sales agent in Chicago for appellant, whose principal place of business was in Philadelphia. Appellees were jobbers in Chicago of men's furnishing goods, including the line of goods manufactured by appellant.

There is competent evidence tending to show that George furnished to appellees a line of samples of the mufflers manufactured by appellant, and that appellees, after securing

orders for such mufflers from their retail customers for delivery in the future, gave their orders for the mufflers so sold by them, to George, who transmitted the same to appellant; that while appellant reserved or exercised the right to accept or reject such orders, such orders were in the usual and ordinary course of business considered as having been accepted by him, unless immediately following the receipt of such orders he elected to reject the same and so notified George; that neither of the orders for mufflers, here involved, given by appellees to George and transmitted to appellant was so rejected by him; that both George and appellant were notified by appellees that the mufflers so ordered had been in fact sold by them to their retail customers; that as to one of said orders for mufflers which were directed to be shipped at once, appellant notified appellees that an extension of ten days time in which to make the shipment would be necessary, and that appellees granted such extension; that by reason of the failure of appellant to fill said orders it became necessary for appellees to purchase mufflers at the current market price, which was in excess of the contract price, for the purpose of supplying their customers upon the orders theretofore taken, and that by reason of the inability of appellees to procure certain grades of said mufflers so ordered by them from appellant, they lost the profits upon such mufflers theretofore sold by them to their customers.

While the evidence bearing upon the issues of fact involved is conflicting, we can not say that the trial court was not warranted in finding the facts as above summarized.

Ordinarily, where a vendor fails to comply with his contract to sell and deliver certain goods at a fixed price, the proper measure of damages in an action by the vendee is the difference between the contract price and the value of the

goods in the market at the time and place of delivery, but where the vendor knows that the vendee has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the goods to enable the vendee to perform his contract, profits which would accrue to the vendee upon performing the contract of re-sale may properly be said to have entered into the contemplation of the parties in making the contract, and such profits constitute a proper measure of damages. Carpenter v. First Nat. Bank, 119 Ill., 353; Nat. Candy Co. v. Nichols Candy Co., 135 Ill. App., 44. This rule as to the measure of damages was properly applied to the facts as found by the court.

The judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, 1912. No.

453 - 18934.

MARY METZGER, Appellee,	}	APPEAL FROM
vs.	}	CIRCUIT COURT,
CHICAGO RAILWAYS COMPANY, Appellant.	}	COOK COUNTY.

187 I.A. 68

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellant to recover damages for personal injuries a trial of which in the Circuit Court resulted in a verdict and judgment against appellant for $1,225. The only point in appellant's assignment of errors which is here urged and argued is that the verdict of the jury is against the manifest weight of the evidence bearing upon the question of appellant's liability.

The declaration charges that on June 10, 1911, appellant operated a street railway on 12th street; that appellee was then a passenger on a west bound car on said street; that when said car arrived at 51st avenue, it was stopped to permit appellee to alight therefrom; that while appellee with proper care for her own safety and at the invitation of appellant was in the act of alighting from said car and before she had sufficient time to alight therefrom, appellant then and there so negligently managed said car that the same was caused to start and move forward at a rapid rate of speed and by sudden jerks and motions, whereby appellee was then and there thrown from said car to and upon the ground and injured.

Appellee's version of the manner in which she sustained the injuries complained of is wholly unsupported by any corroborating evidence, is directly contradicted by the testimony of three unimpeached witnesses, and is further discredited by her admitted statements against interest made at

the time the accident occurred and by the apparent contradictions in her testimony relating to material matters.

It is indisputably established by the evidence that at about 3 o'clock in the afternoon on the day in question, appellee accompanied by her little daughter five or six years of age, was a westbound passenger upon one of appellant's pay-as-you-enter cars operating on 13th street; that shortly before the car reached 51st avenue the conductor walked through the car from the rear platform to the front platform, and that as he was passing appellee she informed him that she desired to alight at 51st avenue; that when the car reached the regular stopping place at the west crossing of 51st avenue it was stopped for the purpose of permitting appellee and her daughter to alight, and that appellee and her daughter then arose and went to the proper exit at the rear of the car for the purpose of alighting from the platform there.

Appellee testified that her daughter, who was carrying a pair of shoes, preceded her in alighting from the car; that she followed immediately and had stepped upon the step of the platform with one foot and was about to put her other foot to the ground when the car started forward with a jerk and she was dragged a short distance and then fell forward on her face; that she got up without assistance; that when the car stopped and the conductor came back to where she was she told him to let her alone, that she was all right; that in order to get away from him, she told him it was her own fault; that when she attempted to alight from the car she had a small parcel containing soap and salmon in her right arm. She further testified that just after the car jerked the parcel opened and the salmon fell on the platform; that she stooped down and picked it up before she fell off the car. Subsequently, she testified that the salmon fell on the street and that she did not pick it up from the platform.

Edward Orden and Mary, his wife, who lived on the second floor of a house located on the east side of 51st avenue, a short distance south of 12th street, testified that they were looking out of an open window and saw the car come to a stop at the corner of 51st avenue and 12th street; that they saw the little girl after she alighted from the car, then saw the car move forward and then saw appellee lying on the ground; that after traveling a short distance the car stopped; that they were unable to see appellee and the little girl in the act of alighting from the car.

Bonnie O'Leary, the conductor, testified that when the car came to a stop he opened the door at the front platform and looked out and back; that after he had seen the little girl get off and had seen appellee get off and walk directly away from the car about four or five steps he told the motorman to go ahead and then closed the door; that the motorman then started up and the car had run about 10 feet when he heard the little girl scream and he told the motorman to stop again, and the car stopped immediately; that he then ran back through the car and when he reached the rear platform he saw appellee getting up from where she had fallen, a distance of 8 or 10 feet back of where the car stopped; that he asked appellee what happened to her and she said she ran for the car, and it was her own fault; that he asked her to let him have her name to make out a report of the matter, and she replied, "Never mind, that is all my own fault"; that upon his further insistence she finally gave him her name; that when the car started up it did so very slowly and not with a jerk.

Jerry Caughlin testified that he was on the street near the corner of 51st avenue and 12th street; that he saw the car when it came to a stop; that when the car stopped he saw appellee get off and she got off all right; that the car was then standing still; that appellee then got on the car again for a little parcel, while the car was moving slowly and

hadn't moved over five feet; that when she got on the car the second time she grabbed the bundle then got off the car sort of backwards and sat down on the street.

Charles Ruf testified that he was a passenger on the same car; that when the car stopped appellee and her daughter got off; that after appellee got off she dropped a bundle and after the car was started she jumped back on the car again, grabbed the bundle and jumped off; that when she jumped off she fell on the street; that he saw her drop the bundle on the platform; that the car did not jerk while appellee was getting off the first time.

John K. Anderson, the motorman, testified that when the car stopped at 51st avenue, the conductor was on the front platform; that he saw the conductor open the front exit door and look toward the rear end of the car; that he then got a signal or some word from the conductor to start up, and he started up on one point; that the car moved about 15 or 20 feet after it made the first stop until it made the second stop; that he did not get off the car and did not see anything of the accident.

It was incumbent upon appellee to show by a preponderance of the evidence that appellant was guilty of the negligence charged, and that she was in the exercise of due car for her own safety. If, as the preponderance of the evidence tends to show, appellee alighted from the car in safety and was injured while attempting to again board the car, while it was in motion, for the purpose of recovering a package which she had dropped upon the platform, she failed to prove both of the elements requisite to a recovery. We are unhesitatingly impelled to the conclusion that the verdict is against the manifest weight of the evidence and must, therefore, be set aside.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1912. No. 468 - 18039.

1053

IDA SENSTOCK, Appellee,	}	APPEAL FROM
vs.	}	CIRCUIT COURT,
ROYAL TAILORS, a corporation, Appellant.	}	COOK COUNTY.

187 I.A. 69

MR. JUSTICE BAUM DELIVERED THE OPINION OF THE COURT.

Appellee recovered a verdict and judgment against appellant in the Circuit Court for $5,500, as damages for personal injuries.

The facts established by the evidence are substantially as follows: On June 20, 1909, appellee was employed by appellant as a forewoman in a building occupied by appellant and located at No. 419 Fifth Avenue. The building faced west and at its entrance there were two sets of double doors which swing out toward the street and which closed automatically by means of springs and air buffers. The doors consisted of a wooden frame 8½ inches wide at the top and sides and 14 inches wide at the bottom, enclosing a pane of glass 19 inches in width and 6 feet in height. In the evening of June 19th, after appellee had left the building, the glass in the south outside door was accidentally broken and the night watchman then on duty nailed three thin boards 6 or 8 inches wide on the inside of the frame over the shattered glass across the middle of the door. When appellee entered the building at about 8:30 o'clock the following morning the boards were still across the door and a portion of the glass remained in the frame and a portion was scattered upon the sidewalk in front of the door. Appellee did not leave the building after entering it in the morning until she started for home about 3 o'clock in the afternoon. In the meantime the boards had been removed from the door and the door frame had been cleared of the shattered glass. As

appellee was going out of the building, she was immediately preceded by three or four young women, who, when they reached the door, pushed it open and so held it while they passed through, when they released it. When appellee reached the door it had been so released and was closing automatically. As the door was so closing, appellee put out her right hand against it in order to prevent it from closing entirely and for the purpose of pushing it open so she could pass out. As she so put out her hand, she turned her head to avoid the glare of the sun in her eyes, and her hand was only partially placed against the inside of the door frame. In exerting the pressure necessary to prevent the door from closing and to open it, her hand slipped from the edge of the frame and went through the opening caused by the absence of the glass, and she was precipitated through the opening onto the sidewalk and thus injured.

The declaration charges appellant with negligence in permitting the door to be and remain without the pane of glass; in permitting the door to remain without said pane of glass without notice to appellee and without placing some means of protection or guard across the space where said glass had been in said door.

A consideration of the facts above stated can lead to but one reasonable conclusion and that is that the injury complained of was proximately occasioned by the failure of appellee to exercise reasonable care for her own safety. The door in question was provided with a frame of sufficient width to enable appellee by the use of her hand to resist the automatic action of the door in closing and to open the same so that she could pass through the door-way in the ordinary and customary manner. The absence of the glass from the door-frame was so obviously apparent that appellee's failure to observe the condition of the door in that respect can only be attributed

JOHN HARM, Administrator of the Estate of HELEN HARM, deceased, Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

187 I.A. 71

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an action instituted in the Circuit Court by John Harms, administrator of the estate of Helen Harms, deceased, against the Chicago City Railway Company to recover damages for wrongfully causing the death of plaintiff's intestate, a child six years of age. A trial by jury resulted in a verdict and judgment against defendant for $1,500, to reverse which judgment it prosecutes this appeal.

The case was submitted to the jury upon the first, second, and third counts of the declaration, which severally allege negligence by appellant in the operation and management of the car, in operating the car at a high rate of speed, and in operating the car at the place in question without giving any warning by bell or otherwise.

Thirty-first street runs east and west and upon this street appellant operates a double track street railway whereon east bound cars are run on the south track and west bound cars on the north track. At or near the point where the deceased was killed 31st street is intersected by Lowe avenue. On October 30, 1909, the day in question, the cars operated by appellant on said street were about 30 feet in length and of the single truck type, having four wheels located beneath the middle of the car.

The deceased was struck by or came in contact with a west bound car at or near the point on the south or blind side of the car, where the front fender projects slightly

beyond the body of the car. There is some conflict in the evidence relating to the precise point on 31st street where the accident occurred, but a preponderance of the evidence tends to show, and the jury were clearly warranted in finding, that it occurred at or immediately south of the east cross walk of Lowe avenue. It was Hallow'een, and the deceased, together with several other children, were playing at or near the southeast corner of 31st street and Lowe avenue. Other children were playing at or near the northeast corner of said streets. As the deceased was running or "prancing" from the southeast corner to the northeast corner of said streets, she was struck by the car or by the fender of the car. Her dress became entangled in the fender and she was dragged beneath the car to a point about 30 feet west of the west cross walk of Lowe avenue before the car was stopped and the body of the deceased was removed.

It is necessarily conceded by appellant that under the law the deceased was not chargeable with contributory negligence, but it is insisted that the verdict of the jury is against the manifest weight of the evidence upon the issue involving the negligence of appellant.

Appellant's case in the trial court was predicated upon the theory that the deceased was struck by the car at a point 10 or 15 feet west of the west cross walk, but this theory, as we have heretofore observed, is not sustained by the evidence. The motorman testified that when the car was about 100 feet east of Lowe avenue it was going about 7 or 8 miles an hour; that at that point he threw off the power and sounded the gong, and crossed Lowe avenue at a speed of 5 or 6 miles an hour; that he saw the deceased running out from the sidewalk at a point about 15 feet ahead of the car; that he applied the brakes at once and had reduced the speed of the car to 3 miles an hour when the deceased came in con-

tact with it; that he then stopped the car within a distance of about 15 feet. The motorman's version of the affair is corroborated in the main by the testimony of Mrs. Kaiser.

The testimony of the witnesses called on behalf of appellee is to the effect that as the car was approaching the east cross-walk on 31st street and at the time it struck the deceased it was "progressing very rapidly", was "going a little fast", was "going kind of swift", was "going pretty fast", was "going fast". It is said by appellant that these expressions of the witnesses are vague, indefinite and meaningless, and that unaccompanied by other or more definite evidence they do not tend to prove negligence. The characterization by the witnesses of the speed of the car in the terms quoted was not incompetent, (Ill. Cen. R. R. Co. v. Ashline, 171 Ill., 313; Overton v. C. & E. I. R. R. Co., 181 Ill., 323), and coupled with the fact that the car ran from two to three times the distance within which it could have ordinarily been stopped under the existing conditions, if it had been running 5 or 6 miles an hour when the motorman observed the deceased going across the street and when she was struck, the testimony justified a finding that appellant was negligent in that respect. The jury were also warranted in finding from the evidence that appellant was negligent in failing to sound a gong or give any warning of the approach of the car upon the occasion in question.

The verdict is not contrary to the manifest weight of the evidence and the judgment is affirmed.

Judgment Affirmed.

October Term, 1912. No.

490 - 18970.

CLARA MORRIS, Appellee, vs. HARDER'S FIREPROOF STORAGE AND VAN COMPANY, a corporation, and E. C. LUEDEKA, Appellants.	}	APPEAL FROM COUNTY COURT, COOK COUNTY.

187 I.A. 72

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the County Court by Clara Morris against Harder's Fireproof Storage and Van Company, a corporation, (hereinafter called the storage company), and E. C. Luedeka, to recover the value of one piano and one stool which plaintiff placed in storage in the warehouse of the storage company on March 3, 1909. To the declaration in the usual form in trover, defendants pleaded the general issue and also a special plea, averring that plaintiff placed her piano in storage with the storage company and agreed to pay $1 per month for such storage; that plaintiff failed and neglected to pay the storage charges and that pursuant to the provisions of section 33 of article 2 of an act in regard to Warehouse Receipts in force July 1, 1907, said storage company sold said piano for $30, the amount due for storage and expenses of sale.

A trial by jury resulted in a verdict and judgment against defendants for $430, to reverse which judgment they prosecute this appeal.

The only controverted question of fact in the case is the fair market value of the piano and stool.

On March 3, 1909, the piano and stool in question were received by the storage company for storage at an agreed charge of $1 per month. Plaintiff then informed the storage

company that she was going to leave the City of Chicago and would probably be absent about two years. In June, 1909, she paid the charge for storage up to July 3rd following, when she left the City of Chicago, and did not return until January, 1910, when she went to the warehouse of the storage company and demanded her piano and stool and was then informed that the property had been sold in March, 1911, in satisfaction of the lien thereon of the storage company for storage charges and expenses of sale, amounting to $30, which was the exact amount realized for the property at the sale. The defendant storage company became the purchaser at the sale of the property in question and the same was removed by it to a salesroom, where it conducted a second hand store.

It is not claimed that the provisions of section 33, relating to the mailing and publication of notices preliminary to the enforcement by the defendant storage company of its lien for storage charges were not complied with, but it is insisted that the sale of the property in question by said defendant to itself was at least voidable at the election of the plaintiff; that such sale operated as a conversion by said defendant of the property in question, and authorized a recovery by the plaintiff of the value of said property at the time of such conversion.

In Hannah v. The People, 198 Ill., 77, it is said:

"The rules of law applicable to the position and relation occupied by public warehousemen, and to their duties, are the same that apply to trustees, and others who occupy fiduciary relations. The law has established limitations upon the power of those occupying such confidential relation, to act in relation to the property and the interests of those who are the rightful beneficiaries of the trust. One of the restrictions is that, in the execution of the trust or fiduciary undertaking, duty and interest must not come in conflict and the opportunity for such conflict must not be permitted. This rule is applicable to those who hold license under the constitutional provisions and the provisions of the act of 1871, which was enacted in pursuance of the command of the constitution. Where it is evident a trustee has so conducted the affairs of the trust and his personal affairs as

that a conflict between his duty and his personal interest necessarily arose, the courts have uniformly held the transaction constructively fraudulent. The rule is, not only that frauds by trustees shall be prevented, but that opportunity and temptation to fraud shall not be permitted. (37 Am. & Eng. Ency. of Law, 200.)"

Without doubt the duty of the defendant storage company as a public warehouseman arising out of the fiduciary relation created thereby precluded it, at the election of the plaintiff, from asserting ownership of the property claimed to have been acquired by purchase at a sale conducted by it.

It is conceded by counsel, and it is apparent from the record, that the verdict of the jury assessing the damages at $420 was predicated upon a finding that the value of the property at the time of the conversion was $450, from which amount $30 was deducted for storage charges and expenses of the sale.

The evidence for the plaintiff bearing upon the question of the value of the piano tends to show that the piano was purchased upon the installment plan for $550 by a sister of the plaintiff about six years prior to its being stored in the warehouse of the defendant storage company; that the purchaser was unable to pay the notes given for the purchase price, as they matured, and that plaintiff took the piano and paid said notes; that the piano had been used about one month during the entire interval, since it was purchased; that it had been moved on two occasions prior to the time it was stored in said defendant's warehouse; that it was not scratched or marred or damaged. Plaintiff introduced no substantive, credible evidence tending to show the value of the piano, other than her statement that it was worth as much when it was stored with the defendant as it was when she purchased it.

It is a matter of common knowledge that the price

paid upon the installment plan for a staple article in common use is not a proper standard by which to determine the fair market value of such article, and that the depreciation in the fair market value of a piano at a time six years subsequent to its purchase, and which, in the language of the trade, is "second hand", is very great.

Evidence offered on behalf of the defendants tends to show that the fair market value of the piano at the time of the conversion was from $30 to $100.

The verdict is so manifestly excessive that it cannot be permitted to stand. If the competent credible evidence in the record furnished a basis for a reasonably intelligent conclusion as to the fair market value of the piano in question, we should not hesitate to require a remittitur by the plaintiff, in order, if such requirement was complied with, that this litigation might here terminate, but we find ourselves unable to reach such a conclusion from the evidence adduced.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1912. No. 353 - 18820.

1059

187 I.A. 4

IN RE ESTATE OF GORIS VANDER SYDE, Deceased,

On Appeal of GUS SWANSON, Claimant, Appellant,

vs.

ESTATE OF GORIS VANDER SYDE, Deceased, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

The Circuit Court of Cook County refused to allow a claim of appellant, Swanson, against the estate of Goris Vander Syde, deceased, for $236.99 for material and labor furnished in extending a heating plant in the premises, 11105 Michigan avenue, Chicago.

The cause was heard by the court upon an agreed state of facts, in substance, as follows:

Goris Vander Syde, the owner of said premises, on August 9, 1905, leased them to William C. Wood for five years from that date at a rental of fifty dollars per month, the lessee to pay all water and general taxes, special assessments and insurance, and to have the option to renew the lease for five years more at the expiration thereof. The lessee sublet the building and stated by letter of December 18, 1908, to the lessor that it would be desirable to extend the building to the alley at an estimated cost of $4,250, and that it would increase the monthly rental to seventy-five dollars per month and give 7% net on the additional investment. On January 21, 1909, Wood stated to the lessor by letter that he had secured bids for the cost of the proposed addition, the lowest bid being $3,900, and also stated: "As stated before, I will guarantee there will be no extras, so that $3,900 is all the entire work will cost you."

The next day the lessor made a new lease to the lessee, Wood, for five years from April 1, 1909, at an annual rental of $900, one-half thereof payable on the first of October, and the other half on the first day of April of each year of the new lease, the lessee to pay water and general taxes, special assessments and insurance, and to have a right to renew the lease for another five years. The lessor then contracted with J. L. Carnegie & Son to complete the said addition for $3,900, according to certain plans and specifications which did not include the extension of the heating plant, and the extension was completed and paid for by the lessor. The lessee had possession of the entire premises as enlarged, and had at his own expense previous to the extension installed a heating plant in the old building. He then directed appellant, Swanson, to extend the heating plant into the new portion of the building. The charges therefor were charged in appellant's books of account to "William C. Wood, Vander Syde building," and not against Vander Syde, the deceased, and Vander Syde had nothing to do personally with Swanson concerning the new heating job, or in contracting for the same. Swanson completed the job May 26, 1909, two weeks after the death of Vander Syde, and the claim of appellant is for the work and material so furnished, and there is no dispute as to the value or character of the work performed.

In Addition to said stipulation appellant offered the testimony of Wood, said lessee, in substance, that after considerable progress had been made on the addition, the testator, Vander Syde, authorized him to have the work in question done on the heating plant; that he employed appellant for that purpose, no definite price being agreed upon; that appellant did the work therefor; and that appellant never had any conversation with Vander Syde about said job or contract.

The Circuit Court ruled that Wood was an incompetent witness against the executor of said deceased, because the witness was interested in the result of this suit, and the correctness of that ruling is the sole question presented by this appeal.

The right of a tenant to receive payment from his landlord for improvements placed upon the premises during his term must arise, if at all, from his contract with the landlord. No such right grows out of the relation of landlord and tenant in the absence of a contract securing to the tenant such right. Diederich v. Rose, 328 Ill., 610; Underhill on Landlord and Tenant, Sec. 749.

The evidence in this case with his own testimony excluded makes a clear case of liability on the part of Wood to appellant. Wood's offered testimony tended to make the estate of Vander Syde, deceased, liable for the claim. Wood was, therefore, clearly an interested witness in the result of this suit, and was an incompetent witness under the statute. Butz v. Swartz, 135 Ill., 180; Bruner v. Battell, Exr., 83 Ill., 317; Skeen v. Moore, 120 Ga., 1057, a case similar in all respects with the case in hand.

It is argued by appellant that Wood's interests are equally balanced and that he is, therefore, indifferent to the results of this suit, and a competent witness under the holdings in the cases of White v. Rose, 147 Ill., 437, and Baker v. Updike, 155 Ill., 54.

This argument is based upon the assumption that in case appellant recovers in this case, appellee could recover over against Wood by reason of his guarantee to Vander Syde that the work of the addition to the building should not cost the latter more than $3,900; and upon further claim that Wood, if sued by appellee, could not testify in that suit, and that there are no witnesses to the conversation testified

to in this case by Wood between the said deceased and himself as to Wood's authority to have the heating plant extended. The argument is unsound. In the first place, it is not true that it clearly appears that Wood would be liable over for any judgment against appellee by reason of his said guaranty. He only guaranteed that the addition would not cost more than $3,900, including all extras, and it did not cost more than that sum, and the heating plant was not included in that estimate and guaranty, but was a separate and distinct contract for which the estate is liable by reason of Vander Syde's undertaking with Wood, if Wood's testimony is true.

Even if Wood was so liable to the estate of Vander Syde on his said guaranty, it would only amount to a further argument that the debt in question is owed by Wood and not by appellee, and that there should not be a judgment in this case in any event against appellee based upon the testimony of Wood. No judgment can be legally given against appellee upon the testimony of Wood, except upon the inference therefrom that Vander Syde, and not Wood, was to be liable to appellant for his claim. Wood was testifying to that end, and evidently was not a disinterested witness in the result of the case.

The ruling and judgment of the Circuit Court were right, and the judgment is affirmed.

JUDGMENT AFFIRMED.

March Term, 1913, No.
158 - 1158.

1060.

ERVIN T. WOOD, Defendant in Error,	)	ERROR TO
vs.	)	SUPERIOR COURT
THE WABASH RAILROAD COMPANY, Plaintiff in Error.	)	COOK COUNTY.

187 I.A. 7

MR. PRESIDING JUSTICE WITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff, Ervin T. Wood, recovered a judgment against the defendant, The Wabash Railroad Company, for $18,500, for personal injuries sustained by him while in the defendant's employ as a switchman in its yards at Fort Wayne, Indiana. Several grounds for reversal are urged, but as we have reached the conclusion that a new trial should be granted on account of errors in instructions, it will not be necessary to consider the other errors assigned.

At the time of the accident the plaintiff, who was an experienced switchman, was the "field man" in a crew engaged in switching the cars of a train consisting of five freight cars and an engine. The train was in charge of a conductor named Wohl. The first or end car of the train was a heavily loaded box car. This car was "kicked back" past a switch, along what is called a "passing" track, to a point approximately 200 feet beyond the switch. There was a slight up-grade from the switch to the point where the car stopped. While the first car was moving along the "passing" track, the next two cars of the train were switched to another track leading to an electric light plant. In this movement, the last of the two cars was not entirely clear of the switch when it stopped. Just as it stopped on the switch, Wohl noticed that the car which had been kicked into the passing track had started to run back and was moving towards the switch at the rate of two or three miles an hour. To prevent a collision, he

called out to the plaintiff: "Block that car." The plaintiff, who was watching the second and third cars, turned, picked up a rusty "fish-plate", or "angle iron", which he saw lying on the ground, and holding one end of it in his right hand, laid the other end across the rail in front of the wheel of the moving car. The fish-plate did not stop the car, but was pushed along the rail by the car wheel. The plaintiff and one other witness testified that thereupon Wohl called out to the plaintiff: "Put it lengthways", and that in attempting to put the iron under the wheel in that manner, the plaintiff's hand was caught between the fish-plate and the rail, and his arm was run over. Wohl's testimony is somewhat contradictory upon this point. At one time he said that he "would not like to say" whether he told Wood to "put the fish-plate in lengthwise", or not. Later on, he testified that he did not tell Wood to use the fish-plate, but merely told him to stop the car. He also testified that it was customary, under such circumstances, to pick up some object and put it under the wheels to stop the car, that it was Wood's duty to do this, and that he (Wohl) relied on Wood to see that the car did not come back.

The plaintiff's declaration stated, in effect and in substance, that the conductor was a vice-principal and that the plaintiff was bound to conform to his orders and directions; that under the statutes of Indiana (which were pleaded) a railroad company is liable for injuries sustained by an employee "where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform", and also where the injury was caused by the negligence of a fellow-servant who was "at the time acting in the place, and performing the duty of the corporation in that behalf", and the

person injured was obeying an order of some superior at the time of such injury; and that the plaintiff was injured through the negligence of the conductor, to whose order the plaintiff was bound to conform, while obeying the conductor's order to block the wheels of a moving car. While the statutes of Indiana thus pleaded remove the defense that the negligence claimed was that of a fellow-servant, they do not remove the defense of contributory negligence, nor do they remove the defense of assumed risk, except to the extent that the negligence of a fellow-servant is not to be considered as one of the risks assumed by an employee of a railroad company. Under the pleadings as thus framed, the plaintiff was required to prove that his injury was caused by attempting, without negligence on his part, to comply with an order given him by the conductor to perform a task involving a hazard which was either not one of the usual incidents of his employment, or was of such a character that because of ignorance or inexperience on his part, he was justified in relying upon the order of the conductor as an assurance that the task might be safely performed. The evidence was undisputed that the conductor ordered the plaintiff to block or stop the moving car. But we think a jury might reasonably find from the evidence of Mohl and from other facts and circumstances in evidence that the plaintiff was given no other or further directions, but chose his own method, and exercised his own judgment, in attempting to comply with the conductor's order, and might also reasonably find from the evidence, that in any event the work which the plaintiff was directed to do was within the scope of his employment and the danger arising therefrom was plainly apparent and fully known to the plaintiff. It follows that defendant was entitled to have the jury accurately instructed as to the law applicable to its theory of such controverted facts.

The defendant requested two instructions, which the court refused to give, stating in substance that if the jury find from the evidence that in obeying an order of the conductor, the plaintiff was injured, not by reason of any directions in the order itself, but by reason of the manner in which he performed the order, then the jury should find the defendant not guilty. These instructions stated a correct proposition of law applicable to one theory of the facts of this case. I. C. R.R. Co. v. Swift, 218 Ill. 307. It does not appear from the Indiana decisions offered in evidence that the law in that State is different in this respect from the law in Illinois. The principle involved in these refused instructions is not covered by any instruction that was given, and in our opinion it was error for the court to refuse to submit to the jury the hypothesis of fact therein stated.

By the nineteenth instruction given to the jury, they were told that "where an employee is given a specific order to perform a certain act by another employee, to whose orders he was bound to conform, and did conform, that he will not ordinarily assume the risk of obeying such order or be guilty of contributory negligence in attempting to perform such act, unless the danger was so great that no ordinarily prudent person would obey such order or attempt to perform such act." The instruction then attempts to apply this alleged principle to the facts of this case by stating that if the jury believe from the evidence that an order was given to the plaintiff "to block the wheels of said car" and that in attempting to obey such order, the plaintiff was injured, "then the jury are instructed that the plaintiff did not necessarily assume the risk in obeying said order and was not necessarily guilty of contributory negligence in attempting to block the wheels of said car, but the jury may and should consider the fact, if the jury believe it to be a fact, that the plaintiff was given such order in determining as to whether or not the plaintiff assumed the risk

of obeying such order or was guilty of want of due care for his own safety." By this instruction, the defenses of assumed risk and contributory negligence were treated as having precisely the same meaning, force and effect. The test to be applied to each was declared to be the same, viz: whether the danger was so great that no ordinarily prudent person would obey such order or attempt to perform such act. This is a proper test to be applied to the question whether an employee is guilty of contributory negligence in obeying a peremptory order, but it has no proper place or application in the determination of the question of assumed risk involved in such cases. The distinction in this respect, as recognized in Illinois, is very clearly pointed out in the opinion in C. & E. I. R.R. Co. v. Heerey, 203 Ill. 492, where an instruction containing the same fault was held to be erroneous. The Indiana cases offered in evidence and relied on by counsel for defendant in error in support of the legal principle stated in this instruction, are cases in which an employee was ordered to perform an act not within the scope of his employment. In such cases, the doctrine of assumed risk does not apply, for the reason that such risks are not covered by the contract of employment. Counsel for defendant in error evidently appreciates this distinction, for he insists that the evidence in this case shows that the act which the plaintiff was ordered to do, viz: block a moving car, was not within the scope of plaintiff's employment. But in view of the conflict in the evidence on this point, this was a question of fact for the jury to decide and not one of law to be determined by an instruction. We do not think the error noted in this instruction was cured by any other instruction.

For the reasons stated, the judgment of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No.
212 - 19217.

In the Matter of the Estate of PERMELIA BROWN, Deceased.

CHARLES H. FRENCH, Executor of the Last Will and Testament and Codicil thereto of PERMELIA BROWN, Deceased,

Appellant,

vs.

UNIVERSITY OF CHICAGO,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

187 I.A. 109

STATEMENT OF THE CASE. This is an appeal by Charles H. French, the executor of the last will and testament of Permelia Brown, deceased, from an order of the Circuit Court directing him, as such executor, to pay to the University of Chicago, as the residuary legatee named in said will, a balance of $8833.68, remaining in his hands at the time of the final settlement of his accounts as such executor. This order was entered on appeal by the executor from a like order entered by the Probate Court of Cook County.

Permelia Brown died testate on July 9, 1909, in Chicago. By the terms of her last will and testament she bequeathed to her sister "Mary Ann" (surname not given) "the sum of $5,000, providing she survives me", and a like sum to her sister "Margaret" (surname not given) "providing she survives me"; and after making sundry other bequests and legacies, all the residue of her estate was given, devised and bequeathed to the University of Chicago. The proof of heirship made in the Probate Court shows that at the time of her death Permelia Brown was a widow, aged about eighty years, and without children; that her parents were dead; that her only known relatives were the two sisters above mentioned, whose whereabouts were unknown; that the deceased had neither seen nor heard from them for many years; that

when last heard of, the sister Margaret was living, unmarried, in Chicago, about the time of the great fire of 1871; that the sister Mary Ann had moved to Detroit many years ago, was married there in 1849, to a man named Mayville, and had one son, named Anthony Mayville: that after the death of Permelia Brown inquiry had been made at the residence of Anthony Mayville in Detroit, and a search had been made of the public records of that city, resulting only in the discovery of a death certificate stating that one Mary Mayville, born in 1841, whose relatives were unknown, had died in a hospital in Detroit in 1903. It also appears from the evidence in this case that Anthony Mayville, claiming to be the nephew of Mrs. Brown, had brought suit in Cook County to contest her last will and testament, but without success, and that while in Chicago at that time, he stated that his mother had been dead more than ten years and that he knew nothing of the whereabouts of his aunt Margaret. Whether anything further as to the whereabouts of Mrs. Brown's two sisters was brought out in the will contest does not appear from the record filed in this court.

The transcript of the record shows that the will of Permelia Brown was dated December 1, 1904, that there was a codicil, dated December 2[illegible], 1907, that the will and codicil were filed in the office of the clerk of the Probate Court on July 14, 1909, that on July 22, 1909, proof of heirship was taken and an order was entered, finding that the names and addresses of the heirs at law "if any, if living" are "unknown, and upon due and diligent search cannot be ascertained." It does not appear from the transcript when the will was proved and admitted to record.

A rule of the Probate Court was offered in evidence which provides, in substance, that no executor or administrator shall be discharged from his duties, or have his final account approved, unless he shall give notice, in the manner therein

stated, to the heirs at law, and residuary and unpaid legatees, if any, of the time of his intended application therefor; that where such heirs or legatees reside outside of Cook County and within the United States, the notice shall be published at least once in some newspaper published in Chicago, at least thirty days before such application; that where such heirs or legatees reside outside of the United States, "or whose names and places of residence are unknown to the executor", a notice shall be published at least once in some newspaper published in Chicago at least sixty days before such application; and that in either of such cases, the executor or administrator shall cause an affidavit of such non-residence to be filed, and a copy of the published notice to be mailed by the clerk of the court within five days after such publication to each address given in the affidavit.

In pursuance of this rule, the executor published, on July 13, 1911, a notice in a newspaper in Chicago entitled: "In the matter of the final settlement of Permelia Brown, deceased. To Anthony Mayville, Margaret _____, and Mary Ann _____, sisters of said deceased, whose surnames are unknown", stating that on September 14, 1911, at 10 o'clock A.M. or as soon thereafter as the matter could be heard, the executor would present to the Probate Court of Cook County his final account and ask that the same be approved, that the estate be declared settled, and the executor discharged. On the same day, an affidavit of non-residence was filed, giving the residence of Anthony Mayville at a certain street and house number in Detroit, Michigan, and stating that the residences of the others are unknown. A certificate of the clerk was also filed showing that within five days of such publication, he mailed a copy of said published notice to Anthony Mayville at the address given in the affidavit.

On July 26, 1911, the executor filed his final account, showing his receipts and disbursements, and a balance on hand of about $30,000, of which amount, it was stated, "the executor proposes" to pay $5,000 "To Margaret, sister of deceased, or to her heirs or devisees if said Margaret survived deceased", $5,000 "To Mary Ann, sister of deceased, or to her heirs or devisees, if said Mary Ann survived deceased", to sundry other persons, sundry items, and "such balance as there may be to the University of Chicago." It appears that the hearing on this account was continued from time to time in the Probate Court; that on October [illegible], 1911, the executor filed an additional account, showing the payment of part of the balance thus shown and a new balance of $1[illegible],38[illegible], which balance (it was said) "the executor proposes to disburse" in the same manner as before stated; that on February 20, 1912, he filed a second additional account, showing further payments and a balance on hand of $10,[illegible]23.78, which, after deducting a certain legacy and court costs, the "executor proposes to pay according to the terms of the last will and testament and codicil thereto of Permelia Brown, deceased."

On February 1, 1912, an order was entered in the Probate Court, stating that the court, having considered the proofs of heirship, finds "that Margaret and Mary Ann, sisters of Permelia Brown, deceased, who were bequeathed the sum of $5000 each by clauses seventh and eighth of the will of deceased, if they survived testatrix, both died prior to the death of the testatrix and that the above mentioned legacies * * * lapsed and became a part of the residue of said estate." On February 21, 1912, an order was entered in which, after finding that due notice had been "given to all the legatees, heirs at law, and other parties in interest, according to the law and rules of this court, and this court having jurisdiction of the subject matter," it was

ordered that the final accounts of the executor be approved; that out of the balance in his hands the executor pay certain items not in controversy, and pay the balance, amounting to $6635.85, to the University of Chicago as residuary legatee; and that upon filing receipts for such payments, the executor be discharged.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The sole question presented by this appeal is whether the Probate Court had jurisdiction to enter the order appealed from without further notice than that recited in the foregoing statement of facts.

Section 112 of the Administration Act provides that "No final settlement shall be made and approved by the court, unless the heirs of the decedent have been notified thereof, in such manner as the court may direct." Appellant's counsel concede that the notice given in this case was in accordance with the rule of the Probate Court and he admitted upon the trial that the rule had been entered of record and was in force at the time the notice was published. We contends, however, that such a notice is not of itself sufficient to give the court jurisdiction of the persons of the missing legatees, if living, or if dead, of their legal representatives. It is insisted that a further notice to the absent legatees given in such manner as directed by the court in and by a special order for that purpose, was necessary, in order to give the court authority to direct the payment of the amount of their legacies, as lapsed legacies, to the residuary legatee. We are unable to agree with this contention. The section of the Administration Act above quoted merely requires notice of the "final settlement" to be given in such manner as the court may direct. The Probate Court, by a rule

entered of record, has prescribed the manner of giving such a notice. The sections of the Administration Act immediately following section 112 clearly contemplate that proper orders of distribution shall be entered upon the final settlement of an executor's accounts. Section 116 provides that whenever it shall appear that there are sufficient assets to satisfy all demands against the estate, "the court shall order the payment of all legacies mentioned in the will of the testator." That fact appeared in this case when the final account was presented to the court for approval. In Strawn v. Jacksonville Academy, 340 Ill. 111, it was held that the power and authority given to the Probate Court by section 116 includes the power to determine the legal rights of the legatees, that under section 110, no legatee can maintain an action against an executor for the payment of a legacy until the Probate Court shall have ordered it to be paid, and that any order made by the Probate Court in the exercise of the jurisdiction given it by these sections, is valid and binding upon the parties and a protection to the executor. In Exton v. Zule, 14 N. J. Eq. 501, it was held under a similar statute, that a notice of the proposed settlement of the final accounts of an administrator is sufficient notice upon which to base a binding order of distribution, for the reason that the distribution is a part of the final settlement.

It appears from the evidence that if the sisters of Pernelia Brown, deceased, are living, their "names and places of residence are unknown to the executor," that he made an affidavit to that effect and filed it in the office of the clerk of the Probate Court, and that due publication was made in accordance with the rule of the Probate Court applicable to such cases; that if they are dead, their only known heir is Anthony Mayville, and that due service by publication and mailing was also had upon him. It follows that whether the sisters be living or dead, due

notice by publication, as required by statute and the rule of the Probate Court, was given to every person interested, of the intended application of the executor for the approval of his final account, and for a final settlement and discharge. No final settlement could be made so as to discharge the executor without an order of distribution or an order approving a distribution already made. Therefore, notice by publication, of the presentation of the final account and application for final settlement and discharge was constructive notice to the sisters, if living, and to their only heir, if they are not living, either that a final order of distribution would be entered, or that payment had already been made to the residuary legatee, subject to the approval of the Probate Court. Having jurisdiction by statute of the subject matter, and having jurisdiction by due publication, of the persons of the missing legatees, if living, and of their sole heir, if they are not living, we think the Probate Court had full jurisdiction, without further notice, to make the order which was entered, and therefore the Circuit Court did not err in entering a similar order on appeal.

The case of Reizer v. Mertz, 233 Ill. 555, relied on by appellant's counsel, is clearly distinguishable from the present case by the fact that in that case there was no order or rule entered of record in the County Court directing what notice should be given to heirs at law of the presentation of the final account. The decision in that case is based upon that fact. In this case, the fact is otherwise.

We are not impressed with the argument that the notice was insufficient because of the fact that the executor stated in his final accounts that he "proposed" to pay to the sisters of the deceased, "if living", the amount of their respective legacies, and to pay the balance, only, to the University of

Chicago. If, as we have held, the Probate Court had jurisdiction both of the subject matter and of all parties interested, it clearly had jurisdiction to determine the rights of the parties to the balance remaining in the hands of the executor, and to order the executor to pay over the same to the persons entitled thereto, whether such a disposition of the fund was "proposed" by the executor, or was opposed by him. Strawn v. Jacksonville Academy, supra.

We think the executor is fully protected by the orders of the Probate and Circuit Courts. The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

1065

March Term, 1913, No.
219 - 19234.

JOHN H. O'NEIL, Administrator of the Estate of ROCCO MARRONE, deceased,
Plaintiff in Error,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY,
Defendant in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

187 I.A. 126

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment of the Superior court of Cook county, rendered in favor of the Illinois Central Railroad Company, defendant below, upon the verdict of a jury finding the defendant not guilty, in an action for damages for personal injuries sustained by Rocco Marrone resulting in his death.

The accident occurred about 6:30 o'clock on the morning of October 31, 1908, in the railroad yards of defendant in the city of Chicago, near the Van Buren street station. For four or five years prior to his death the deceased had been employed by defendant in and around the yards and tracks of defendant, and his duties required him to put up and take down switch lamps, sweep off the steps and platforms at said station, and pick up loose paper and debris around said yards and platforms. Van Buren street, which passed over the tracks in an easterly and westerly direction by means of a viaduct, was high enough above the tracks so that a man standing on top of a box car would clear the viaduct. The tracks were straight and ran in a northerly and southerly direction and were numbered from west to east 1, 2, 3, etc., consecutively. The tracks numbered 1 and 2 were used for suburban passenger service. North-bound trains ran on track No. 2 and south-bound trains on track No. 1. On the west side of track No. 1 and on the east side of track No. 2 were platforms running

parallel with the tracks. These platforms were for the use of passengers entering and leaving the suburban trains. They were elevated from the ground so as to be on a level with the floor of the passenger cars, and they extended a considerable distance both north and south of the Van Buren street viaduct, from which stairways descended to each platform on both the north and south sides of the viaduct. Beneath the north stairway which descended to the platform east of track No. 3 was a shanty in which waste paper was collected until a sufficient amount was on hand to be taken away. The part of said platform north of the shanty was supported by wooden posts placed eight or ten feet apart connected by cross pieces running east and west; otherwise the platform was open underneath. Track No. 3 was immediately east of said east platform and was used for the storage of cars and for switching purposes. Running along the east side of said platform was a railing made of gas-pipe. On the east side of the tracks of defendant was a concrete wall 12 or 15 feet high and on the west side of said tracks was a stone wall of about the same height.

At the time of the accident it was "clear, good daylight". A switch engine, pushing ahead of it two gondola cars loaded with coal, approached from the south on track No. 3. This train was running at a speed of from 5 to 7 miles per hour. A suburban passenger train was pulling into the station from the south on track No. 2. The two trains reached the platform, north of the viaduct and between tracks Nos. 2 and 3, at about the same time. The passenger train, in coming to a stop, made considerable noise. The crew of the coal train consisted of a foreman, a switchman, the engineer and the fireman. The foreman, Woodall, was standing on the top of the coal on the forward car about 10 feet from the front end of the car, keeping a lookout ahead. The switchman was standing on the front beam of the engine, back of the two coal cars.

The engineer was sitting in the cab of the engine on the east side, and the fireman in the cab on the west side. When the forward car of the coal train was about abreast with the shanty, Woodall first noticed Rocco Marrone about 12 feet ahead of the forward car, walking north between the platform and the west rail of track No. 3, with his back to the coal train and apparently unaware of its approach. Woodall instantly gave a "slow" signal to the engineer, to which the engineer at once responded and shut off the steam, and at the same time Woodall twice called out as loud as he could, "John, get out of there", but Marrone "didn't seem to pay any attention" to the call. The forward coal car cleared Marrone but he was evidently struck by the second car and run over by the forward west wheels of said car, receiving injuries from which he shortly thereafter died. None of the train crew, except Woodall, saw Marrone before he was struck. At the time of the accident the bell on the engine of the coal train was ringing, but the engineer did not blow the whistle or receive any signal to blow the whistle. The train was brought to a stop about 30 feet beyond where Marrone was lying after he received his injuries.

Plaintiff's declaration consisted of a number of counts. One count charged in general terms the negligent operation of the coal train while the deceased was in the exercise of all due care for his own safety. Several of the counts charged a violation of certain ordinances of the City of Chicago, hereinafter mentioned, which, it was claimed, forbade a speed of more than 6 miles per hour by a freight train at the place of the accident. Two other counts were framed on the theory of wanton negligence. In the first of these counts it was charged that the servants of defendant who were operating and managing the freight train discovered plaintiff's intestate and his position upon the track, and his peril, in sufficient time, by the exercise of reasonable

care, to have avoided injuring him, but that they wantonly and recklessly ran said car and engine against and over him, etc. In the second of these counts it was charged that said servants discovered plaintiff's intestate and his position upon the track, and his peril, in sufficient time, by the exercise of reasonable care, to have warned him "by the blowing of the steam whistle with which the engine of said train was equipped, but that they wantonly, negligently and recklessly failed to blow the said whistle as a signal of danger", whereby, etc.

At the conclusion of plaintiff's evidence the defendant moved that the jury be instructed to find the defendant not guilty, which motion was denied and defendant excepted. The defendant did not introduce any evidence, and the jury, after receiving the instructions of the court, returned a verdict finding the defendant not guilty.

Just prior to the closing of plaintiff's case, plaintiff offered in evidence Section 1978 of the ordinances of the City of Chicago, in force at the time of the accident. This section provides, inter alia, that no railway company, by itself, agents or employes, shall run any freight car or cars upon or along any railway tracks within said city at a greater rate of speed than 6 miles per hour, "except as hereinafter otherwise provided in section 1984 1/2", and that "the provisions of this section shall not apply to such trains or cars while running or being operated upon railroad tracks elevated above or depressed below the surface of the streets crossing or adjacent to such tracks, * *". The attorney for defendant objected to the introduction of said section on the ground that, under the facts shown, (viz: said tracks being depressed below Van Buren street which crossed over said tracks) said section was not applicable to the issues in the case. The court sustained the objection and refused to admit said section

in evidence. Plaintiff thereupon offered in evidence sections 1994 and 1994 1/2 of said ordinances. Section 1994 provides, inter alia, that every corporation owning, leasing or operating a steam railroad within said city shall, within such time as may be prescribed by the city council, construct or cause to be constructed on each side of its tracks, and in such place with reference thereto as the city council shall direct, except where public streets shall intersect or cross the same, substantial walls and fences, and shall erect and maintain gates and signal bells and other safety appliances, for the purpose of giving due and timely warning of the approach of trains, cars or engines at all such street and public crossings within said city, etc. Section 1994 1/2 provides that, whenever the provisions of section 1994 shall be fully complied with by the owner or lessees of any railroad track in said city, the speed of trains required in section 1978 shall not apply. The section then proceeds to divide the city into three districts, within which different kinds of trains shall run at certain specified speeds. The section then provides, inter alia, that in the first district (which is the district where the accident happened) it shall be unlawful for freight trains to run at a speed greater than 6 miles per hour, and that it shall be unlawful for "switch engines and cars being moved in making or breaking up trains in any district" to run at a speed greater than 9 miles per hour. The attorney for defendant objected to the introduction in evidence of said sections 1994 and 1994 1/2 on the ground that under the facts in evidence said sections were not applicable. The court sustained the objection and refused to admit said sections in evidence, to which ruling plaintiff excepted. At the conclusion of all the evidence the court also gave to the jury instructions Nos. 2 and 3, at the request of defendant, to the effect that there was no proof that the defendant, at the

time and place in question, was violating any city ordinance as to speed.

It is here contended by counsel for plaintiff that the trial court erred in refusing to admit in evidence said sections, 1994 and 1994 1/2, of the city ordinances, and in giving to the jury said instructions Nos. 2 and 3. The argument is, as we understand it, that the evidence shows that there were solid walls on each side of defendant's tracks as far south as 51st street, and that the only intersecting streets that cross said tracks were Randolph street and Van Buren street, in both of which cases the streets are elevated above and carried over said tracks by means of viaducts; that it is "apparent, then, that the defendant had complied with the provisions of section 1994"; that having complied with said section 1994, the provision of section 1994 1/2, limiting the speed of freight trains in the district where the accident happened to 6 miles per hour, was in force, and that the provisions of section 1978, relative to the speed of trains or cars upon tracks elevated above or depressed below the surface of the streets crossing such tracks, had been superseded by section 1994 1/2 and were not applicable to the present case; that the evidence showed that the freight train in question at the time of the accident was moving at a greater speed than 6 miles per hour in violation of said section 1994 1/2; and that, hence, the trial court erred in the particulars mentioned. After careful consideration of the several sections of the city ordinances and of the facts in evidence, we are of the opinion that counsel's argument is without merit, and that the trial court did not err in refusing to admit in evidence said sections 1994 and 1994 1/2, or in giving said instructions.

Counsel for plaintiff also contends that the trial court erred in refusing to give the following instruction, No. 18, offered by plaintiff:

"The jury are instructed that when persons in charge of a railroad train discover the presence and perilous condition of one on the tracks, though guilty of contributory negligence, it becomes their duty to use reasonable care to prevent injury; and the jury are further instructed that if they believe from the preponderance of the evidence in this case that the persons in charge of defendant's train discovered Rocco Marrone on the track in a position of peril in sufficient time by the exercise of reasonable care to have prevented the injury by warning the said Rocco Marrone of their approach by the blowing of the steam whistle attached to the engine of said train, and if you further believe that they failed to so blow the said whistle and that such failure was the proximate cause of the injury, you are instructed the defendant is liable for such injury."

Counsel argues that this instruction was framed as embodying plaintiff's cause of action as set forth in the second of the wanton negligence counts above mentioned, and that, while certain instructions of a general character as to wanton negligence were given to the jury, still plaintiff was entitled to have submitted to the jury, by a specific instruction, the question as to whether the failure of the persons in charge of defendant's train to have blown the steam whistle as a danger signal constituted wanton or wilful negligence. We do not think that the instruction, as drafted, was a proper one. It tells the jury, in effect, that the failure to blow the steam whistle, after the persons in charge of the train had discovered the deceased on the track in a position of peril, was negligence as a matter of law. In our opinion the instruction was properly refused. (Illinois Central R. Co. v. Johnson, 231 Ill. 44, 46; Illinois Central R. Co. v. Griffin, 194 Ill. 9, 18; Pittsburg, etc., Ry. Co. v. Banfill, 206 Ill. 553, 566; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 597.)

In view of the fact that one of the counts in plaintiff's declaration charged negligence at common law, in that the defendant, by its servants, carelessly and improperly drove and managed the locomotive engine and train of cars, we do not think that the court erred in giving instruction No. 5, at the request of defend-

art, as contended by counsel for plaintiff. And we do not think that the trial court, in giving instructions Nos. 7 and 8 at the request of defendant, committed error prejudicial to the plaintiff.

Finding no reversible error in the record, the judgment of the Superior court is affirmed.

AFFIRMED.

March Term, 1913, No.
241 - 19247.

FRANK J. HATHWAY, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
CASSIUS F. SMITH, Appellee.	)	OF CHICAGO.

187 I.A. 128

STATEMENT OF THE CASE. On November 16, 1911, Frank J. Hathway, plaintiff, commenced an action of the first class, in contract, in the Municipal court of Chicago against Cassius F. Smith, defendant, to recover the sum of $12,500 for commissions due plaintiff, as it was claimed, for procuring a purchaser, ready, willing and able, for all of the capital stock of the Ocmulgee River Lumber Company, a corporation doing business at Lumber City, Georgia, which purchase, however, was never consummated because, as it was also claimed, of the misrepresentations of the defendant and his failure to deposit said stock in escrow as agreed, and without fault on the part of plaintiff.

Two jury trials of the case have been had. The first resulted in the jury returning a verdict, on October 23, 1913, finding the issues against the defendant and assessing plaintiff's damages at the sum of $12,500, the full amount of plaintiff's claim. A new trial was granted. At the conclusion of all the evidence introduced by both parties at the second trial the court, on motion of defendant, directed the jury to return a verdict finding the issues against the plaintiff, which was done, and judgment was entered upon the verdict, which judgment plaintiff by this appeal seeks to reverse.

The trial was a protracted one and hotly contested. Two witnesses testified on behalf of plaintiff - the plaintiff and George J. Pope. Plaintiff also offered in evidence about 52 "exhibits", consisting of letters, telegrams and other writings,

20 of which were admitted in evidence and the others refused admission. At the conclusion of plaintiff's evidence the court refused defendant's motion to instruct the jury to find the issues in defendant's favor. On behalf of the defendant two witnesses, including defendant, testified and 5 "exhibits" were offered and admitted in evidence.

On August 28, 1911, the defendant, then being the president and general manager of the Ocmulgee River Lumber Company and the record owner of one-third of the capital stock of the company, approached plaintiff, then president of the Hathway Lumber Company, a corporation engaged in the wholesale lumber business at Chicago, with a proposition that plaintiff endeavor either to secure for defendant a purchaser for the entire capital stock of said Ocmulgee Company (capitalized at $300,000) at a price of $250,000, or to secure for defendant a loan of $200,000 for the purpose of enabling defendant to purchase the two-thirds of said capital stock, which was then owned by certain New York parties, and on which defendant represented he then had an option of purchase. On the same day defendant, at Chicago, signed and delivered the following letter to plaintiff, dated August 28, 1911, (Exhibit A) and also delivered to plaintiff the following statement, referred to in said letter, as to the assets and liabilities of said Ocmulgee Company (Exhibit B):

> "In regard to the plant and holdings of the Ocmulgee River Lumber Company, Lumber City, Ga. would say, I will give you the option to secure purchaser for this plant including the entire stock at $250,000, or to procure a loan of $200,000 with which the purchase of two-thirds interest in said company now belonging to Messrs. Turner and Burnham of New York, upon which I now have an option, and which together with the one-third interest which I now hold would cover the entire stock of said company. The company's assets and liabilities are shown by the statement given you under date of August 1st.
>
> For your information would state the actual cost of logging, sawing, yarding, selling, shipping and planing mill expense from January 1, 1911, to June 1,

1911, was $7.67 per M. ft. The average selling price during the same period less all discount and allowances was $15.25 per M. ft. During this period from January to June we shipped seven and one-half million feet and to the best of my judgment the stock shipped during this period was below the average output of the mill in value.

The mill is a double band mill with an average capacity of 100,000 ft. every ten hours.

I have none of the records with me of the exact profits from year to year, but will state that the profits during 1909 were $50,000, during 1910, $30,000; during which time we charged off $50,000 for depreciation and $30,000 for bad accounts, making a gross profit during last two years of $120,000 above all expenses of every nature.

In case of a loan being made as herein suggested, I will undertake to repay same at the rate of $50,000 per year and will, of course, give security on the entire property for the amount of the loan.

I will give you thirty days to ascertain what, if anything, can be done on this deal and if negotiations are then pending will extend the time sufficiently to complete.

It is, of course, understood that in case of a deal being perfected other than by a straight purchase, that the terms and conditions will have to be satisfactory to me.

It is further understood in case of a deal being made as herein suggested that you are to receive from me as your compensation 5 per cent. on the deal made."

The statement referred to in the letter is as follows:

"Statement -- Ocmulgee River Lumber Company,
Lumber City, Georgia, Aug. 1st, 1911.

Assets.

Cash Assets-		
Cash	$12,500	
Bills and accts. rec.	70,500	
Lumber	118,000	
Logs	7,000	
Merchandise	1,000	
Mill supplies	3,000	
		$212,000
Capitalized Assets-		
Logging outfit and live stock	17,000	
Railroad	55,000	
Saw mill $100,000		
Less depr. 25,000	75,000	
6,500 acres, land, fee	65,000	
Real estate and Town Site	20,000	232,000
Wasting Assets-		
95,000,000 ft. Yellow Pine		
10,000,000 ft. Cypress		
40,000,000 ft. Gum		
50,000,000 ft. Oak, Hickory and Ash		
195,000,000 ft. at $4 M;	$780,000	$780,000 $1,224,000

Liabilities-		
Bills payable	$40,000	
Current a/p	3,200	
		$43,200
Capital Stock	300,000	
Surplus	880,800	
		1,180,800
		$1,224,000"

It will be noticed that in said statement no details appear as to the logging outfit, railroad and saw mill, as to the land held in fee, or as to the character of the yellow pine timber, whether or not it was "long leaf", and whether or not the timber, designated as "wasting assets", was on leased lands and, if so, how long the terms of the leases were.

Plaintiff testified that on the same day he presented the proposition to several possible buyers and bond houses with the view of either making a sale or procuring a loan; that on the next day, August 26th, he again met the defendant, told the latter what he had done and that he thought he would be able to handle the proposition one way or the other without doubt; that he also told the defendant that he desired additional information and gave defendant a written memorandum of such information desired; that defendant thereupon said that his son, Ray Smith, would assist defendant in getting that information and that as soon as it was procured he would send his son to Chicago with all the necessary information, and that defendant left for Lumber City, Georgia, that night. Plaintiff also offered to show that during said conversation defendant told him that the "yellow pine", mentioned in said statement, was "long leaf", and that the timber leases ran for a long term of years, but the court would not allow this testimony in evidence and plaintiff excepted.

On August 28th, plaintiff wrote defendant to the effect that he desired defendant to immediately write him assuring him that defendant's estimates as to the assets were "reasonably correct and conservative;" that he wanted a letter from defendant setting forth the actual facts which he might show to prospective purchasers: that he did not wish to get parties to spend money in investigating the proposition and have them finally ascertain that it was "other than practically as represented;" that he had the matter well in hand but had gone as far as he thought wise until hearing further from defendant; and that he suggested that defendant, if possible, obtain an extension in writing from the majority stockholders of the option to purchase their stock at the price stated, and that defendant be prepared, in case plaintiff arranged to have any party make an investigation of the proposition, to come to Chicago and to give a formal option on the property for a sufficiently long time to allow for a proper investigation. This letter was admitted in evidence. Plaintiff testified that about this time he presented the proposition to George J. Pope of Chicago, a wealthy lumberman, and showed him plaintiff's contract (Exhibit A) and also the statement of the assets and liabilities of the Ocmulgee Company (Exhibit B); that he told Pope that defendant would furnish plats and further detailed information in regard to the mill plant, inventory, cost of production, etc., and that he believed that defendant's representations could be relied upon; that Pope looked over Exhibits A and B and said that "if this proposition was reasonably as represented by Exhibit B he believed he would buy the property," and that he would hold one of his men in the south in readiness to examine the proposition.

On September 4th, plaintiff wired defendant: "Mail information requested. Arrangements proceeding nicely but date important." On the same day defendant wrote plaintiff: "I am enclosing the only statement I have completed up to now. I am having an inventory taken and will be able to send you more information in a few days. * * * Let me know what you can do and what I can sell the bonds at." In this letter of defendant the following statement was enclosed:

"Stumpage - Average cost per M ft. . $1.31
Logging " " " " " . 2.83
Saw Mill " " " " " . 2.31
Yarding " " " " " . .56
Shipping &
Planing Mill " " " " " . 1.70
General Exp. " " " " " . .78
Interest " " " " " . .28
Insurance " " " " " . .38
Total cost $10.12 per M. ft.
Average selling price per M ft. . . 14.79
Net profit per M ft. 4.67
Lumber manufactured 7,295,328 ft. from Jan. 1st, 1911 to July 1st, 1911."

On September 6th, plaintiff wrote defendant: "Yours of the 4th with statement received. In reply would say that we can get at least 90 for the bonds and perhaps better, if you wish to bond. Would you not rather sell as proposed? Let me hear from you with additional information at the first possible moment. I assume that you will come up here if I wire you." On September 9th, plaintiff again wrote defendant urging the latter to immediately forward "inventory, plats and other information" and to wire plaintiff when they might be expected, and saying, "How about extending option on Turner's stock long enough for investigation?" On September 11th, defendant wired plaintiff: "Ray has with him maps, inventory and such other information as you mention as is obtainable in short time. Will see you tomorrow. He stopped off at Lafayette. Everything as I represented to you and will improve on investigation. I can get more time should a deal be pending." On the trial the

attorney for defendant objected to the admission in evidence of the above documents, saying that he would admit that plaintiff negotiated with George J. Pope, interested Pope in the proposition and got him to go down to Georgia and investigate the property. With those admissions of defendant in the record the court sustained the objections and plaintiff excepted. The court also refused to allow plaintiff to show that plaintiff had shown Pope defendant's letter of September 4th and the statement enclosed therein as to cost of production and net profit, and plaintiff excepted.

Defendant's son, Ray Smith, arrived in Chicago on September 13th, and plaintiff, Pope and Ray Smith had a protracted conversation relative to the condition of the affairs and property of the Ocmulgee Company. On the theory that defendant, by his wire of September 11th to plaintiff, had made his son his agent to represent him in giving to plaintiff and Pope the additional information required, plaintiff offered to testify what Ray Smith said at that conversation and what representations he made. The court allowed plaintiff to testify that Pope was introduced to Ray Smith as the prospective purchaser of defendant's property, that Pope said he was much impressed with the proposition but wanted additional information as to the amount of timber on the land, the character of the pine timber, the length of the leases and the condition of the railroad, and that Ray Smith answered many questions propounded to him by Pope and plaintiff; but the court, on the theory that any specific representations Ray Smith made as to condition of the property would not be binding on defendant, notwithstanding defendant's wire of September 11th, refused to allow plaintiff to testify that at said conversation Ray Smith, in response to questions, said that the pine timber was long leaf, that all the timber leases, except those covering a very small part of the

property, ran from 12 to 20 years, that the pine for the most part had not been "boxed" or "turpentined", and that the cost of production of the lumber, as shown in said statement contained in defendant's letter of September 4th, was correct and that he had helped in the compiling of the figures, to which rulings plaintiff excepted. The court also refused to allow plaintiff's witness, George J. Pope, to testify what Ray Smith said at this conversation.

On the same day, September 13th, plaintiff wired and wrote defendant to the effect that Ray Smith did not have sufficient information, that he wanted defendant to send him complete inventory and plats showing amount of timber on each lot, list of leases on each lot, description of mill and amount of material on hand and railroad equipment, and that defendant get extension of his option for Turner stock for 60 days. This telegram and letter were admitted in evidence. On September 20th, defendant wired plaintiff: "Have had accountant at work two weeks. His report will be written up this week and will be complete in every detail." This telegram was refused admission. On the same day plaintiff wrote defendant: "I have a party amply able to finance this deal, who today told me to get an extension of the option either for 60 days or for a sufficient length of time to make proper examination of the property. * * * My party says that if the assets and liabilities are as represented by you and sufficient time is given to examine he will purchase the property at the price outlined in your letter to me of August 25th, 1911." This letter was refused admission on the ground that defendant knew at this time that Hathway was negotiating with Pope. On September 28th defendant wired plaintiff: "Have not received accountant's report. Have report made by our bookkeeper. Shows practically what I represented. No reply from Turner. Think Burnham away the cause. Will guarantee

delivery of stock. Prefer that parties deal with me instead of Turner." This telegram was refused admission, but defendant's letter to plaintiff of the same date, and which was to the same effect as the telegram, was admitted in evidence. In the letter defendant wrote that the statement made by the bookkeeper was enclosed, but plaintiff testified that no statement whatever was enclosed. Several other letters and telegrams passed between plaintiff and defendant between this date and October 17th, but the same were refused admission. In defendant's letter of October 13th to plaintiff defendant wrote that he had procured a new option, expiring November 8th, from Turner as to the stock owned by Turner and Burnham, with "some strings tied to the option," but that Turner was willing to sell the stock, and defendant suggested that plaintiff bring his man down to Lumber City, and if this be done within a few days "I will guarantee to carry out my agreement with you."

Plaintiff testified that between September 18th and October 17th he had many conversations with Pope about the "deal" and showed him all letters and telegrams passing between plaintiff and defendant; that on October 13th Pope told plaintiff that a man named Joice had called upon him with another option on the property; that on October 16th Pope told plaintiff that he was ready to go ahead with the deal, but that for his (Pope's) protection he would like to have the stock put in escrow in some Chicago bank, before he (Pope) went to the expense of "cruising" the timber, and that if this was done he (Pope), in company with one of his men, would go to Lumber City and make the examination, and that if the property was reasonably as represented he would buy it; that plaintiff told Pope that he (plaintiff) would immediately go to Lumber City and see if the stock could be so put in escrow, pending Pope's examination of the property; that plaintiff left Chicago for Lumber City on October 17th; that

plaintiff there met defendant on October 19th and told defendant that Pope was interested in the proposition and that Pope wanted the stock placed in escrow as a protection before going to the trouble and expense of investigation; that thereupon defendant said that Pope was a good man, that there was no question but that the deal would be completed if he would come down, and that on account of Pope's financial standing defendant could make the terms better than he had previously offered: and that thereupon the following letter or additional agreement, dated October 19, 1911, was drafted and signed by defendant and delivered to plaintiff:

"Frank J. Mathway, Esq.,

On August 25, 1911, I wrote you agreeing to give you an option for the sale of the entire capital stock of the Ocmulgee River Lumber Company for the sum of $250,000. In that letter I said that I would give you thirty days to ascertain what, if anything, could be done on the deal and promised that if negotiations were then pending, I would extend the time sufficiently to complete. Within the period of 30 days you having advised me that you could make the sale, provided the representations I made you as to the property were found reasonably correct, now, in consideration of the efforts already put forth by you in that behalf and further efforts to be put forth in fully consummating said sale, and in consideration of the sum of $1 this day paid me by you and finally in furtherance of my agreement contained in said letter of August 25, 1911, I hereby give you the exclusive agency for the sale of the entire capital stock and assets of said company for the sum of $250,000, you to sell as provided in said letter of August 25th. You are to have this exclusive agency for a period of 60 days from this date. And I agree to pay you a sum equal to 5 per cent. of $250,000 in case you make a sale of said stock. Now in case of sale of the stock I shall want cash inasmuch as I only own outright $83,000 of the stock but have options on the remaining stock, that is I shall want cash for at least two-thirds of the entire amount and the balance in six months from date of the trade in negotiable paper.

As soon as you have caused to be made a preliminary examination and notify me that you are ready to send your man or men south for the purpose of estimating the timber and property, in detail, as an evidence of good faith on my part that I will carry forward the deal you are making, I will cause to be deposited in some National Bank in Chicago, all the capital stock of said corporation subject to the terms of the deal you may make.

I agree to furnish you immediately accurate descriptions of all the leases held by the corporation,

and abstract of all the land owned by the corporation and under contract to the corporation, together with accurate maps of the property owned, controlled or leased by the corporation, true and complete inventories of all lumber on hand and all other assets of the corporation. And I will also furnish you within five days from date true copy of the auditor's report recently made of the affairs of the corporation.

This option agreement is a continuation and amplification of the letter I wrote you August 25, 1911 in the City of Chicago, Illinois.

In witness whereof I have hereunto set my hand and seal this 19th day of October, 1911.

C. F. Smith. (Seal.)

Witness:

Jno. Knox."

Plaintiff further testified that as soon as the above letter or agreement was signed he asked defendant for the auditor's report of the affairs of the company; that defendant replied that he did not then have it, that the auditors were Messrs. Marwick and Mitchell of New Orleans, that they had been in the company's office for over two weeks preparing their report, which "would show the actual condition of affairs accurately and completely", and that he would wire for the report and give it to plaintiff; that defendant did wire for said report and that plaintiff wired Pope, advising him of the situation, etc.; that plaintiff then commenced an examination of the papers, records, deeds and other papers given him for examination by defendant; that on October 20th defendant, in reply to a wire received from Pope, wired Pope: "I have never considered Joice being able to float this deal. Am now wiring him that our deal is cancelled. My son responsible for this predicament. Hathway has legal option. Come and look;" and that subsequently defendgave plaintiff list of leases, showing how long same had to run, and an inventory of lumber on hand. Said list of leases and inventory were admitted in evidence. The list of leases showed that the total stumpage or feet of timber was about 168,000,000 feet, that 26 lots only, having thereon about 42,000,000 feet of timber, were owned in fee, and that the balance of the timber was

on leased land, the large majority of the leases expiring in 1913 or 1915. The inventory of the lumber on hand as of August 31, 1911, showed the total estimated value thereof to be about $105,500. Plaintiff further testified that after he had examined the mill and plant he and defendant, at the latter's suggestion, went to Jacksonville, Florida, to meet some lumbermen; that they also went to Brunswick, Georgia, the seaport for the mill; that it was arranged that Pope would meet plaintiff and defendant at Atlanta, Georgia, and from there go to Lumber City; that Pope, accompanied by a man named Graham, met plaintiff and defendant at Atlanta about October 27th; that while en route to Atlanta defendant gave plaintiff the promised auditor's report of the condition of the affairs of the Ocmulgee Company; that plaintiff and Pope examined this report at Atlanta; that plaintiff there again showed Pope his original contract with defendant of August 25th (Exhibit A) and the statement accompanying the same (Exhibit B), and also showed Pope the additional contract of October 19th, said list of leases and said inventory of lumber on hand, all of which Pope examined; and that in the evening Pope, Graham, plaintiff and defendant went to Lumber City. The said auditor's report was introduced in evidence. This report was signed by Marwick, Mitchell & Co. and dated September 25, 1911, and stated that the auditors had examined the books and accounts of the Ocmulgee Company for the period of 8 months ending August 31, 1911; that defendant was president of the company, W. A. Burnham, vice-president, and J. C. Turner, treasurer; that a majority of the timber leases would expire in 1913 or 1914, and that unless these leases could be renewed, under profitable conditions, the value of the property as a whole would be very much depreciated. The report showed, inter alia, the amount of standing timber to be 138,075,000 feet, including the leased timber valued at $140,400, (as against

195,000,000 feet valued at $4 per M, or $780,000 as shown in Exhibit B); cash on hand $2,921 (as against $13,800 in Exhibit B); accounts and bills receivable $47,437 (as against $70,500 in Exhibit B); lumber and mill supplies $101,849 (as against $139,000 in Exhibit B); net loss in operation of the business for the 8 months from January 1, to August 31, 1911, $2,892; and net logging cost on timber $10.55 per M, cost of loading and selling $1.01 per M, saw mill and shingle mill expense $3.73 per M, or a total expense of $15.29 per M (as against actual cost of logging, sawing, yarding, selling, shipping and planing mill expense of $7.37 per M feet, as stated in Exhibit A, and as against average cost of $10.12 per M feet, as stated in defendant's statement contained in his letter to plaintiff of September 4th).

Plaintiff further testified that after the party arrived at Lumber City, Pope, Graham and plaintiff examined the mill and lumber in the yard; that then defendant piloted the party into the woods and showed them a small portion of the timber - about 500 or 600 acres; that they were in the woods only about 4 or 5 hours; that the timber shown was very poor; that defendant said that the major portion of the pine timber was not long leaf; and that Pope was "rather disgusted" with the appearance of things and left Lumber City the next morning for Brinson, Georgia. The evidence disclosed that on October 20th Pope, from Jesup, Georgia, wired the Pate Lumber Company of Chicago, of which corporation he was vice-president: "Nothing in the proposition examined." Plaintiff further testified that, after the examination of the lumber in the yard, he pointed out to defendant the discrepancies shown between the inventory of the stock and the stock actually on hand; that defendant replied that this could be accounted for by sales and promised to furnish plaintiff with a new inventory, which he never did; that after

the return from the trip into the woods plaintiff complained to defendant as to the latter showing Pope and Graham such a poor lot of timber, and that defendant replied that he had made a mistake and had got lost and that he would show plaintiff some good timber on the following day; that on the next day defendant showed plaintiff some good timber; that upon the return from the woods that night plaintiff had a talk with Pope at Brinson over the long-distance telephone, reported to him the finding of good timber and that defendant had said the apparent discrepancy between the lumber Actually in the yard and the inventory would be accounted for by a new inventory, and urged Pope to reserve his final decision on the proposition until plaintiff could again see Pope in Chicago; that Pope said he would withhold his decision; that plaintiff told defendant of this conversation with Pope over the telephone; that at a subsequent conversation defendant told plaintiff that he (defendant) would see the agent of the owner of the lands on which the timber stood and endeavor to get extensions on the timber leases, which he thought he could get; that defendant never obtained these extensions; that defendant also told plaintiff that Ray Smith had wired defendant that Turner had made a deal with Joice as regards a portion of the capital stock of the Comulgee Company, but that defendant did not believe the information correct; that plaintiff left Lumber City for Chicago on October 30th, telling defendant that he was going to stop over at Meridian, Mississippi; that on November 2nd defendant sent two telegrams to plaintiff at Meridian, one that "Ray writes message correct. Turner has signed away all their stock," and the other that defendant would see plaintiff in Chicago on Saturday, November 4th; that plaintiff and defendant met in Chicago on that day and further discussed the situation; that early in the following week plaintiff met Pope in Chicago, explained the situation to

him and asked if he (Pope) was ready to go ahead with the deal, and that Pope replied that he was as soon as the stock was deposited in escrow, and that as soon as this was done he would send his "cruisers" to examine the property and that if the same was approximately as represented he would buy the property; that plaintiff then saw defendant and told him what Pope had said, and defendant said that he could not deposit the stock in escrow because it was in New York; and that on November 8th plaintiff wrote defendant a letter. This letter was produced by the defendant on notice and was to the effect that plaintiff had not received the correct inventory as promised; that the promised abstracts of title had not been delivered; that "we are now ready to send an expert south to examine the timber, but before doing so, according to our agreement, you are to deposit all of the capital stock of your company with some Chicago National Bank subject to and for the purposes of our agreement;" and that "I suggest that this deposit be made with the Corn Exchange National Bank. * * * I would like to have this deposited by Saturday, but it must be deposited not later than Monday, the 13th. This will give you plenty of time. * * * My buyer will not go any further with the deal unless it is deposited by Monday. If this deal is not consummated, it will be your fault and not mine." Plaintiff further testified that the last conversation he had with defendant was in Chicago about November 15th; that he then told defendant that on account of defendant's refusal to deposit the stock Pope would not go ahead with the deal; that Pope, however, was ready to proceed with the deal if defendant would deposit the stock; that defendant said he could not deposit the stock, if he wanted to, because it was in the possession of somebody else in New York; and that plaintiff then asked defendant for his remuneration for his services and defendant refused to pay him anything and plaintiff thereupon brought this suit.

The testimony of George J. Pope tended to show that he was financially able to pay the agreed purchase price for the stock, and that while he had arranged with some of his associates in the Pate Lumber Co. and the Stewart Lumber Co., of each of which companies he was vice-president and a large stockholder, to take an interest in the proposition after the stock was purchased, still the deal was his personally and he, personally, was going to pay the money in the first instance. Pope testified at length and he was subjected to a searching cross-examination. His testimony in the main corroborated that of plaintiff, as to the manner in which the proposition was originally presented to him by plaintiff and what was said and done before he made his trip south, as to the trip south, the examination of the various papers at Atlanta, the short trip into the woods, the examination of the plant and the long-distance telephone talk with plaintiff while Pope was at Brinson, as to the renewal of negotiations at Chicago after Pope's return from the south and what was said and done, and as to Pope's final refusal to go ahead with the deal unless defendant would deposit the stock in escrow in accordance with the provisions of the agreement of October 19th. Pope testified that prior to the trip to Lumber City he told plaintiff that he would buy the property at the price named if it was practically or approximately as represented by the documents which had then been shown him, and that after he had returned from the south he told plaintiff in Chicago, about November 6th, that if defendant would deposit the stock in escrow, he (Pope) would enter into an escrow agreement with defendant, and upon that being done he (Pope) would send his cruisers south to make an accurate cruise of the timber, and if the property was practically or approximately as represented he would buy it.

At the conclusion of all the evidence the court instructed the jury to sign a verdict finding the issues in favor of the

defendant. The court stated, in substance, in the instruction that "the rights and duties of the parties are to be found in the contracts in evidence"; that "the contract in evidence is made up of the contract of August 25, 1911, merged into the contract of October 19, 1911, and modified as the contract of October 19th does modify it;" that "taken together they make the contract of the parties;" that plaintiff undertakes to prevail on two theories, first, that defendant in the contract of employment made misrepresentations as to the character, quality, quantity or value of the property to be sold, but the court holds, as a matter of law, that there is nothing to submit to the jury, because plaintiff "has presented no evidence that the representations are false;" second, that plaintiff produced a purchaser, ready and willing and able to buy on the terms proposed, but the court holds that "there is no controverted fact to go to the jury on the question," that the evidence discloses that the prospective purchaser was only conditionally ready and willing to buy, and that conditional readiness and willingness to buy is not sufficient in law to entitle a broker to recover his commissions; and that the court holds, as a matter of law, that "there is not sufficient evidence to show that the defendant was in default on his contract, and that consequently plaintiff has failed to make out such a case and would entitle him to recover."

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is urged by counsel for plaintiff that the court erred in directing a verdict for the defendant at the close of all the evidence.

In Balsewicz v. Chicago etc., R. Co., 240 Ill. 338, 344, it is said: "In passing upon a motion for a directed verdict the court does not weigh evidence. It looks only to the evidence supporting the claim of the party against whom the motion is directed, and that in the light most favorable to him. Contradictory evidence, however strong, cannot be considered. If the condition of the evidence, at the close of the plaintiff's case, does not justify an instruction for a verdict in favor of the defendant, no evidence which the defendant may introduce will justify such instruction except uncontradicted evidence of an affirmative defense. Evidence contradictory of the plaintiff's will not do it." See, also, Craig v. Chicago Coach & Carriage Co., 172 Ill. App. 564, 568; Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213.

In Mechem on Agency, section 987, it is said: "If the broker has fulfilled upon his part, he will be entitled to his commissions although the sale is not consummated because the principal's title proves to be defective: * * or because the purchaser refuses to complete the sale on account of false representations made by the principal." See, also, Goodridge v. Holladay, 18 Ill. App. 383, 385; Glentworth v. Luther, 21 Barb. (N.Y.) 140; McGuire v. Carlson, 61 Ill. App. 296, 297; Hecht v. Hall, 62 Ill. App. 100, 101; Stone v. Deahl, 174 Ill. App. 421, 423; Hanran v. Moran, 71 Mich. 281; Goodman v. Hess, 137 N. Y. Supp. 112.

In Dotson v. Milliken, 27 D. C. App. Cases 500, Milliken, a broker, recovered a judgment against Dotson for $25,000 in an action of assumpsit, for commissions, in the Supreme Court of the District of Columbia, which judgment was affirmed by the Court of Appeals, and also subsequently affirmed by the Supreme Court of the United States (209 U. S. 237). In this case Dotson, president of the Virginia Coke and Coal Company, directed Milliken to endeavor to obtain a purchaser for some of the coal land of his company at the price of $20 per acre, and represented to him that the Southern Railway Co. had agreed to and would build a branch line to the coal land, and agreed with Milliken that he would pay Milliken, as commissions, $2.50 per acre for every acre he could sell. Milliken interested one Easter, president of the Tri-State Coal Co., who agreed to buy 10,000 acres of said land if the representation was correct, and Dotson, as president of the Virginia Co., gave to Easter, personally, a sixty-day option to buy said number of acres, in consideration that Easter should send an engineer to examine and report on said lands. It developed that the representation of Dotson, that said Railway Co. had agreed to build said branch line, was untrue and on that account no sale of said 10,000 acres was made. To Milliken's suit for commissions Dotson defended on several grounds, viz: that a binding agreement by the proposed purchaser to buy had not been procured, that it was not shown that the proposed purchaser was ready, willing and able to buy, that Easter, the proposed purchaser, did not rely on Dotson's representation, and that the sale was never consummated. The Court of Appeals decided (1) that when a broker, employed for the purpose, procures a purchaser willing and able to buy on the authorized terms, he becomes entitled to his compensation, although the sale may not be consummated, provided the consummation is prevented by the refusal, fault, or defective title of the

principal; (2) that when such a broker finds a purchaser willing and able to buy on the principal's terms and in accordance with the principal's representations of material facts, the broker is not bound to effect an actual sale by a binding and enforceable agreement; (See, also, Schulte v. Keehan, 133 Ill. App. 491; Jones v. Howard, 234 Ill. 404) and (3) that where a principal accepts a purchaser found by his broker, without questioning his ability to perform, and the sale fails of consummation by the principal's own fault or failure to make good his offer, the burden is on the principal to show the purchaser's want of ability. In the opinion of the Supreme Court (209 U. S. 244) it is said: "It does not matter how much or how little the purchaser relied upon the defendant's representations, if the plaintiff relied upon them and obtained a purchaser ready and able to purchase upon the bases that the defendant's representations to the plaintiff were true."

We are of the opinion, after a careful consideration of the evidence in the present case, that the trial court erred in directing a verdict for the defendant. We think that there was sufficient evidence, introduced by the plaintiff, to go to the jury on the questions whether defendant had made false representations as to the character, quality, quantity and value of the property to be sold, and as to his ability to deliver all of the stock of the corporation, and whether the plaintiff, relying upon those representations, had obtained a purchaser, ready, willing and able to buy the property upon the stipulated terms and upon the basis that the defendant's representations to the plaintiff were approximately true, and whether the defendant was in default on his contract with plaintiff. Scott v. Stuart, 116 Ill. App. 535, 539, 540; Middleton v. Thompson, 165 Pa. St. 112, 122; And it does not appear that the defendant, after plaintiff had closed his case in chief, introduced such "uncontradicted evid-

ence of an affirmative defense" as would warrant a directed verdict for the defendant.

It is also urged by counsel for plaintiff that the trial court erred in refusing to admit certain evidence offered by the plaintiff. While we think that the court correctly ruled in refusing to admit in evidence many of the letters and documents offered by plaintiff, we are of the opinion that certain portions of plaintiff's evidence, offered and refused admission, should have been admitted; and, as the case must be remanded for a new trial, it may not be out of place for us to here mention certain principles of law which, we think, in addition to the principles enunciated in the Dotson case, supra, should be kept in mind during the next trial. "Where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms." (1 Greenleaf on Evidence, sec. 282; Razor v. Razor, 142 Ill. 378, 379.) And, although it is not competent to contradict or enlarge the terms of a written agreement by parol evidence, it is competent to resort to parol evidence, "in order to ascertain the nature and qualities of the subject, to which the instrument refers." (1 Greenleaf on Evidence, sec. 286; Wilson v. Roots, 119 Ill. 379, 386.) And that "relevant declarations of an agent, provided they are within the scope of his authority and in the course of the negotiations to which it refers, but not otherwise, are admissible in evidence against the principal." (16 Cyc. 1003.)

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No.
282 - 19268.

1067

ROBERT P. HENRY,
Appellee,

vs.

WALTER E. WOOLF, et al.,
by WILLIAM A. DUNN, assignee
of WALTER E. WOOLF,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

187 I.A. 129

STATEMENT OF THE CASE. On September 1, 1909, Walter E. Woolf and Sarah E. Woolf, his wife, purchased from John L. Henry certain premises situated in the city of Chicago, improved by a frame building, and known as No. 5647 Kimbark avenue, and on the same day they executed and delivered to said Henry their two principal promissory notes, one for $800 due March 1, 1910, with interest at the rate of 6 per cent. per annum, and the other for $3500, due September 1, 1912, with interest at the same rate, payable semi-annually, and evidenced by six coupon notes, all being payable to the order of themselves and by them endorsed in blank, and to secure the payment of said notes they executed and delivered their trust deed, acknowledged and recorded on September 17, 1909, conveying said premises to Arthur B. Jones, trustee, together with the "rents, issues and profits thereof", and "all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements" therein contained. It was provided in said trust deed that in case of failure to pay said notes, or the interest thereon, or any part thereof, as and when the same should become due, then the whole of said indebtedness, and the interest thereon to the time of sale, might at once, at the option of the legal holder and without notice, become due and payable. And it was further provided that in case default should be made in the payment, either of the principal or interest of the said indebtedness, or any part thereof, when

due, by election or otherwise, then said trustee should have the right, upon the request of the holder of said indebtedness, to take immediate possession of said premises, and collect the rents, issues and profits of the premises, and apply the same to the payment of the repairs, insurance, taxes and assessments, and the principal and interest of said indebtedness, and that the legal holder of said indebtedness should also have the right to immediately foreclose said deed, and that upon the filing of any bill for that purpose, the court might at once, and without notice, "appoint a receiver, with power to collect the rents, issues and profits of said premises during the pendency of such foreclosure suit, and until the time shall expire to redeem the same from any sale that may be made under any decree foreclosing this trust deed." Subsequent to the delivery of said notes to John L. Henry, the same were endorsed by him and delivered to the complainant, Robert P. Henry.

On April 7, 1911, default having been made in the payment of the $600 note and of the interest on both of said principal notes, Robert P. Henry, then being the owner of said notes, filed his bill in the Superior court of Cook county to foreclose said trust deed. At this time the premises were vacant and unoccupied, the Woolfs having abandoned the same and moved to South Dakota. On complainant's motion the court appointed a receiver, who took possession of the premises and rented the same. The service on the Woolfs was by publication and they were defaulted. All the other defendants were also defaulted, and the cause was referred to a master in chancery, who subsequently reported to the court, finding the amount due complainant and recommending the entry of a decree of foreclosure in complainant's favor. On July 1, 1911, such a decree was entered, and, the debt not being paid within the time fixed in the decree, the premises were sold for $4,700 to said Robert P. Henry on July 27, 1911.

On August 7, 1911, a deficiency decree was entered, in which the court found that there was still due complainant the sum of $170.19, and in which the court decreed that the master's report of sale and distribution be confirmed, and that the complainant "have judgment" against the two Woolfs, and each of them, for the amount of such deficiency, and that the complainant "have a lien upon the rents, issues and profits" for such deficiency from the commencement of the suit "until the expiration of the time of redemption from said master's sale."

On July 26, 1912, one day before the expiration of twelve months after said sale, the defendant, Walter E. Woolf, redeemed said premises, and on said date the master executed and delivered to him a certificate of redemption, which was duly filed for record and recorded on July 27, 1912.

On July 31, 1912, the receiver filed his final report and a petition for his discharge. The report showed that he had received, as rent for said premises from July 1, 1911 to July 31, 1912, the total sum of $385, that he had made various disbursements and that he had a balance in his hands of $165.73. On the same day the court entered an order that said report be approved, that the receiver be discharged upon paying to the clerk of the court xf said balance of $165.73, and that the clerk "hold said fund until the claims thereto of the complainant and the said defendant, Walter E. Woolf, or his assigns, are passed upon by this court." This order as drafted and entered bears the "O.K." of the solicitor for complainant and the "attorney for assignee, Walter E. Woolf."

On December 2, 1912, the petition of "William A. Dunn, assignee of Walter E. Woolf" was filed. This petition, in addition to setting forth the proceedings in said foreclosure suit substantially as above mentioned, alleged that at the time said Woolf redeemed said premises on July 26, 1912, he was indebted

to petitioner in the sum of $198; that on said date said Woolf duly signed and acknowledged before a notary public of Cook county an assignment to petitioner of all his right, title and claim of every kind and nature to the said moneys (viz: $183.73) then in the hands of said receiver, and of all claims of said Woolf for rents which had accrued or were due upon the said premises up to and including July 31, 1912; that petitioner, through his attorney, appeared in court on July 31, 1912, the day said receiver filed his final report, and demanded of the receiver and of the solicitor of the complainant payment to him of said sum of $183.73, in accordance with the terms of said assignment; and that, by reason of the fact that the matter came up during the vacation period of the court and the chancellor was unwilling to then hear the matter, the court entered the order that the receiver pay the clerk of the court said sum of $183.73 and that the clerk hold said fund until, etc., as aforesaid. The petitioner claimed in said petition that, because no personal service had been had on either said Walter E. Woolf or his wife in said foreclosure proceedings, the court had no jurisdiction to enter the deficiency decree of August 7, 1911, wherein the court decreed that complainant "have judgment" against the two Woolfs, and each of them, etc., and that said decree was void. The petitioner prayed that the court order the clerk of the court to turn over said sum of $183.73 to him. To this petition the complainant filed an answer denying that petitioner was entitled to the relief prayed, and subsequently, on December 18, 1912, the court, after a hearing, entered an order denying the prayer of said petition, and directed the clerk of the court to pay over to complainant, or his solicitor, the said sum theretofore deposited. From this order the said "William A. Dunn, assignee of Walter E. Woolf" prayed and perfected an appeal to this court.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is here contended by counsel for appellant that the Superior court erred in entering the order of December 13, 1912, denying the prayer of the petition of said William A. Dunn, assignee of Walter E. Woolf, and directing the clerk of the court to pay to Robert P. Henry, complainant, or to his solicitor, the said sum of $182.73, theretofore deposited with said clerk. We are of the opinion that, under the facts as disclosed from this record, the contention is without merit. We do not think that Walter E. Woolf was entitled to this money, and William A. Dunn, as assignee, had no greater rights than his assignor.

By their trust deed, Walter E. Woolf and wife, to secure the indebtedness evidenced by the two notes, not only conveyed the premises in question but also the "rents, issues and profits thereof." And it also was provided in said trust deed that the legal holder of said indebtedness should have the right to foreclose, and that upon the filing of any bill for that purpose, the court might at once and without notice appoint a receiver, "with power to collect the rents, issues and profits of said premises during the pendency of such foreclosure suit, and until the time shall expire to redeem the same from any sale that may be made under any decree foreclosing this trust deed." It appears that upon complainant's bill being filed to foreclose said trust deed, a receiver was appointed, who took possession of and rented the premises, which had been abandoned by the Woolfs; that subsequently, on July 1, 1911, the court entered a decree of foreclosure; that the premises were duly sold by the master on July 27, 1911; that the moneys arising from said sale were insufficient to pay in full the amount found due the complainant; and that on August 7, 1911, the court entered a

deficiency decree, in which the court found that there was still due the complainant the sum of $170.15, and decreed, inter alia, that the complainant have a lien for such deficiency upon the rents, issues and profits, arising from said premises "until the expiration of the time of redemption from said master's sale." It further appears that on July 26, 1912, just prior to the expiration of the twelve months period, Walter E. Woolf redeemed the premises; that at that time said receiver had in his hands the net sum of $183.73, received as rent for said premises for the period from July 1, 1911 to July 31, 1912, and that on said July 31, 1912, said sum was deposited with the clerk of the court, and said receiver discharged.

"Rents and profits are the subject of mortgage." (First National Bank v. Illinois Steel Co., 174 Ill. 140, 148; Townsend v. Wilson, 156 Ill. App. 303, 307.) By the terms of the trust deed given by the Woolfs, the rents and profits of the land, as well as the land, were pledged for the security and payment of the indebtedness due to the complainant. (Oakford v. Robinson, 48 Ill. App. 270, 273; First National Bank v. Illinois Steel Co., supra; Bagley v. Illinois Trust Bank, 199 Ill. 76, 79.) Had there been no deficiency after the foreclosure sale, the rents would have belonged to the owner of the equity of redemption; but there was a deficiency after such sale, and the complainant had an equitable right under the trust deed to have the rents and profits of the premises applied toward the payment of that deficiency until the expiration of the time of redemption. (First National Bank v. Illinois Steel Co., supra; Owsley v. Reeves, 171 Ill. App. 81, 84.) And, in our opinion, the court was fully warranted in directing, in the deficiency decree, that the complainant have a lien for the deficiency upon the rents and profits arising from the premises until the expiration of the period of redemption, and in subsequently ordering the payment to complainant

of said net sum of $183.75 derived from said rents and profits during said period. (Prussing v. Lancaster, 234 Ill. 468, 487.) And even though, as contended by counsel, the court was not authorized to adjudge, inter alia in the deficiency decree, that the complainant "have judgment" against the Woolfs because no personal service had been had upon them, that fact should not militate against complainant obtaining said sum of money, for the reason that the validity of the order appealed from does not depend upon the portion of the deficiency decree of which the appellant complains, and for the further reason that the present appeal is not taken from the deficiency decree.

The order of the Superior court is affirmed.

AFFIRMED.

March Term, 1913, No.
218 - 19223.

GERTRUDE PETERSEN STORM,
Plaintiff in Error,

vs.

CIGAR MAKERS' INTERNATIONAL UNION OF AMERICA,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

187 I.A. 157

STATEMENT OF THE CASE. This is an action of the fourth class, commenced in the Municipal Court of Chicago, by the plaintiff in error, Gertrude Petersen Storm, (hereinafter designated as the plaintiff) against the defendant in error, the Cigar Makers' International Union of America, (hereinafter designated as the defendant). The plaintiff sued to recover for the death benefits claimed to be due her from the defendant by reason of the death of her brother, Christian Peterson, who, in his lifetime, was a member in good standing of the defendant union. He died December 8, 1906. The local union, under the constitution and by-laws, expended $81.50 for his funeral expenses. The plaintiff, at the time of the death of her brother, lived in Chicago, and she claims that she did not hear of his death until December, 1909. On December 24, 1906, she made a claim in writing to the defendant union. The present suit was commenced on March 5, 1912. The plaintiff's claim, as evidenced by her statement of claim, is for $266.40, together with legal interest since December 24, 1906. The defendant, in the original affidavit of merits and in the amended affidavit of merits, interposes a number of defenses, only two of which were relied upon in the trial of the case. The first of these defenses is:

> "That no claim in writing duly verified by the claimant to any beneficiary money accruing under the said sections of said constitution upon the death of said Christian Peterson was made within one year after the death of said Christian Peterson and under the provisions of said constitution all claims therefor thereupon lapsed and ended, and such beneficiary money as might otherwise have been payable thereunder reverted to the said Union."

1871 Ja. 152

The second is:

> "That the alleged causes of action in the statement of claim and amended statements of claim set forth did not nor did any of them accrue to the plaintiff within five years before said action was brought, and defendant hereby pleads and claims the benefit of the statute in such case made and provided."

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The only question in this case, which we deem it material to consider, is, whether the action of the plaintiff is barred by the Statute of Limitations. The case was tried upon a stipulated state of facts. The facts material to this opinion are as follows: Christian Petersen became a member of the defendant union on July 9, 1892, and he was a member in good standing of the defendant union at the time of his death, December 4, 1906. When he became a member of the union, all that was issued to him was a membership card and due book in words and figures as follows:

> "Cigar Makers' International Union 66310
>
> 651
>
> Union No. 14 of Chicago
>
> Initiated July 9, 1892, M. C. Petersen.
>
> A. E. Adeloff, President.
> H. C. Hauck, Fin. Sec'y."

At this time, the constitution of the said union then in force provided inter alia, for a death benefit in words and figures as follows:

"ARTICLE X.

> Section 1. That upon the death of a member who shall have been such for one year the sum of $50. shall be paid toward defraying funeral expenses of said member to the nearest of kin or such person or persons as have the burial of said deceased member in charge; but if such member should not have any person to take charge of said funeral, the President of the local union shall take charge of the burial of said deceased member; provided however, that said member has not been at the time of his death disqualified by any of the conditions prescribed by the laws of the International Constitution.

> Section 2. That upon the death of a member who has been such for five consecutive years the sum of $200. shall be paid by the International Union to his wife or nearest of kin, or legatee, and that upon the death of a member of ten consecutive years the sum of $350. shall be paid to the wife, nearest of kin or legatee; and that upon the death of a member of fifteen years standing $550. shall be paid as provided above. This sum shall include the $50. provided for funeral expenses in section 1."

In September, 1896, there were certain amendments made to the constitution, in reference to the death benefits, one of these reading as follows: "If no claim in writing, duly verified by the claimant to such beneficiary money is made by any of the above mentioned persons or their heirs or legal representatives, within one year after the death of the member, all claims therefor shall lapse and end, and said beneficiary money shall revert to the union." On the trial of the case, the defendant interposed as a defense the fact that the plaintiff did not file her claim in writing with the defendant union within one year of the death of the member. The plaintiff insisted on the trial, and now insists, that the constitutional amendments of 1896 did not apply to the claim of the plaintiff. The defendant in this court, appears, from its brief, to have abandoned this particular defense. In the view that we have taken of the case, it will not be necessary for us to pass upon the question as to whether the constitutional amendments in question applied to the claim of the plaintiff.

The facts in this case bring it squarely within the decision of the court in the case of Conductors' Benefit Association v. Loomis, 148 Ill. 560. Under the ruling in that case, the contract between the parties in the present case was an oral one, and therefore governed by the five years Statute of Limitations. It would serve no useful purpose for us to quote in detail the opinion of the Supreme Court in the aforesaid case. Counsel for the plaintiff insist that the case of Jones v. Knights of

Honor, 238 Ill. 113, overrules the last mentioned case. We cannot agree with this contention. The facts in the latter case are not similar to the facts in the case of Conductors' Benefit Association v. Loomis, supra, and the Supreme Court, in its opinion in the case relied upon by counsel for the plaintiff reaffirms the rule laid down in Conductors' Benefit Association v. Loomis, supra. The trial court in the present case based its finding in favor of the defendant union on the grounds that the contract between the parties in this case was an oral one and that the claim of the plaintiff was therefore barred by the five years Statute of Limitations. The finding of the court, in our judgment, was justified under the facts and the law, and the judgment of the Municipal Court of Chicago is therefore affirmed.

AFFIRMED.

March Term, 1913, No.
237 - 19243.

1071

GERTRUDE M. SEMHAUSEN,
Appellee,

vs.

OSCAR SEMHAUSEN,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

187 I.A. 159

STATEMENT OF FACTS. In this case a decree of divorce was entered on June 18, 1911, in favor of the appellee, (hereinafter designated as the complainant) and against the appellant, (hereinafter designated as the defendant) in the Superior Court of Cook County. The decree provides that the defendant pay to the complainant the sum of fifty ($50) dollars per week for and during the life of complainant and so long as she remained unmarried; the first payment of fifty ($50) dollars to be made within three (3) days after the entry of the decree and subsequent payments of fifty ($50) dollars to be made weekly thereafter. The decree also makes other provisions in favor of the complainant, and also provides that its provisions shall be in full satisfaction of permanent alimony and in lieu of all dower and homestead rights, claims and demands of the complainant, by virtue of her marriage with the defendant in and to any and all real estate owned or hereafter acquired by the defendant, insurance, personal property, etc. On July 2, 1912, the defendant filed a petition in the said proceedings, setting up that at the time of the entry of the said decree, he was the president of the Standard-Gillett Light Company, a corporation, etc.; that the said company had a capital of fifty thousand ($50,000) dollars; that its business had been successful and that for many years he drew a salary of ten thousand ($10,000) dollars per year and was drawing said salary at the time of the entry of the decree; that during the period of two years prior to the filing of the petition, the said company met with reverses

owing to three fires; that the last of said fires occurred on April 15th, 1912, as a result of an explosion; that the company was able to collect but a small part of its insurance providing for loss against fire; that it was unable to meet the demands of its creditors and that on June 15th, 1912, an involuntary petition in bankruptcy was filed against said company by its creditors; that the Central Trust Company of Illinois was appointed receiver of its property on said day, and that the said receiver was then in possession of the assets and business of the company; that on account of the said fires, the business of the said company had been carried on at a loss during the past two years and that the liabilities of the business at the present time are in excess of sixty thousand ($60,000) dollars; that its assets do not exceed and will not realize a sum in excess of from $25,000 to $30,000; that the defendant had paid to the complainant all of the alimony provided for in the decree at the rate of fifty ($50) dollars per week until April 2, 1912, and that since April 15, 1912, he has not earned more than enough to give him a bare living and that since the receiver was appointed for said company on June 15th, he has been out of employment and has not earned anything; that he is now without a position and is earning nothing; that his business prospects are poor and he has no immediate prospects of getting a position by which he will earn anything, and that he has no real estate or personal property or property of any kind, except his necessary clothing and wearing apparel, and that the complainant is the owner of a farm of the value of about $30,000 and is amply able to care for herself out of her own personal estate. The defendant prays that an order may be entered modifying the decree and providing that the defendant should not be required to pay alimony in excess of five dollars per week, from and after April 23, 1912.

The petition was signed and sworn to by the defendant. The complainant filed a general and special demurrer to this petition. In the special demurrer the complainant alleges that the defendant "is not entitled to a modification of the decree in respect to the amount of alimony to be paid by him, because the recitals of the said decree show that the whole question of alimony was fixed and settled by the agreement of the parties." The demurrer was sustained by the court and the petition dismissed for want of equity.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The sole question involved in this appeal is: Did the chancellor err in sustaining the demurrer of the complainant to the petition filed by the defendant and in dismissing the petition for want of equity? The exact question that is presented to this court in the present proceeding was before the court in the case of Plotke v. Plotke, 177 Ill. App. 344. In that case the court held that where a divorce is granted, and by consent of the parties it is ordered that in lieu of alimony the husband shall pay a fixed allowance to the wife, weekly, monthly or yearly, the court has power to modify the original decree, notwithstanding the fact that it was entered by consent, where it is shown that the circumstances and needs of the parties have materially changed since the entry of the decree. The petition of the defendant in the present case presents a prima facie case for relief, and the chancellor should have overruled the demurrer of the complainant and ordered her to answer the petition. The order of the Superior Court of Cook County sustaining the demurrer and dismissing the petition of the defendant will be reversed and the cause remanded, with directions to the chancellor to overrule the demurrer of the complainant to the petition of the defendant, and to order her

to answer the same. We do not, by this decision, mean to intimate in the slightest way what the judgment of the chancellor should be on the hearing of the petition and the answer.

REVERSED AND REMANDED WITH DIRECTIONS.

March Term, 1913, No.
251 - 19257.

THE MERCHANTS' LOAN AND TRUST COMPANY, Administrator with the Will annexed of the Estate of JOSEPH H. WILLETS, Deceased, Appellant,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
STELLA PEASE HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, Deceased, Appellee.	)	COOK COUNTY.

187 I.A. 161

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The claim involved in this appeal was allowed as of the 7th class of claims by Judge Cutting in the Probate Court of Cook County. On appeal to the Circuit Court of Cook County, the claim was allowed as of the same class. The only controversy in this case is over the classification of the claim. The appellant contends that it should have been allowed as of the 8th class instead of the 7th. The case was tried by the court without a jury, and the facts are set up in a stipulation between the parties. From this stipulation we learn, that Arthur B. Pease died on or about the 7th day of April, A.D. 1911, leaving a last will and testament (which was admitted to probate by the Probate Court of Cook County, Illinois, on April 12, 1911), appointing Stella Pease Hulette executrix; that letters testamentary issued out of said court to said Stella Pease Hulette, which letters are still in full force and unrevoked; that Joseph H. Willets died on or about January 15, 1911, leaving a last will and testament which was duly proved and admitted to probate by the Probate Court of Cook County, Illinois, on April 5, 1911, and The Merchants' Loan and Trust Company was duly appointed administrator with the will annexed of the estate of said Joseph H. Willets, deceased, by said Probate Court, and that the letters of administration issued to it are still in full force and unrevoked; that during a period of from twelve to

March Term, 1913, No.
251 - 19257.

1577

THE MERCHANTS' LOAN AND TRUST COMPANY, Administrator with the Will annexed of the Estate of JOSEPH H. WILLETS, Deceased,
Appellant,

vs.

STELLA PEASE HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, Deceased,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

187 I.A. 161

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The claim involved in this appeal was allowed as of the 7th class of claims by Judge Cutting in the Probate Court of Cook County. On appeal to the Circuit Court of Cook County, the claim was allowed as of the same class. The only controversy in this case is over the classification of the claim. The appellant contends that it should have been allowed as of the 6th class instead of the 7th. The case was tried by the court without a jury, and the facts are set up in a stipulation between the parties. From this stipulation we learn, that Arthur B. Pease died on or about the 7th day of April, A.D. 1911, leaving a last will and testament (which was admitted to probate by the Probate Court of Cook County, Illinois, on April 18, 1911), appointing Stella Pease Hulette executrix; that letters testamentary issued out of said court to said Stella Pease Hulette, which letters are still in full force and unrevoked; that Joseph H. Willets died on or about January 15, 1911, leaving a last will and testament which was duly proved and admitted to probate by the Probate Court of Cook County, Illinois, on April 5, 1911, and The Merchants' Loan and Trust Company was duly appointed administrator with the will annexed of the estate of said Joseph H. Willets, deceased, by said Probate Court, and that the letters of administration issued to it are still in full force and unrevoked; that during a period of from twelve to

fifteen years, said Willets in his lifetime had from time to time turned over sums of money to said Pease to be invested in notes secured by trust deeds, and from time to time said Pease collected for said Willets sums of money upon such notes secured by trust deeds, all of which sums of money so turned over and collected the said Pease received, and from time to time paid over parts thereof to said Willets, and from what was not so paid over said Pease, for and on behalf of said Willets, was to and did, from time to time, invest the same in various notes secured by trust deeds as follows, to-wit: Note of Olaf F. Olsen, dated June 8, 1901, for the sum of two thousand dollars ($2,000); note of Paul Sorensen, dated September 18, 1907, for the sum of one thousand dollars ($1,000); note of Sarah J. Thomas, dated August 7, 1901, for the sum of fifteen hundred dollars ($1500); note of Robert and Lodicie Bartlett, dated March 14, 1904, for the sum of five hundred dollars ($500); that all of said notes were secured by trust deeds of even date to said Pease, trustee, conveying real estate therein described situated in the City of Chicago, County of Cook and State of Illinois; that all of said notes matured and were paid to said Pease several years before his death; that said Pease collected on account of the principal of the note of Olaf L. Olson the sum of five hundred dollars ($500); on account of the principal of the note of Paul Sorensen the sum of five hundred dollars ($500); in full of the principal of the note of Sarah J. Thomas the sum of fifteen hundred dollars ($1500); on account of the principal of the note of Robert and Lodicie Bartlett the sum of two hundred fifty dollars ($250); that all the said moneys so received from time to time and not paid over to said Willets the said Pease converted and appropriated to his own use and failed to account to said Willets in his lifetime, or to The Merchants' Loan and Trust Company, administrator with

the will annexed of the estate of said Willets, deceased, for any of the money so received by him; that there is due The Merchants' Loan and Trust Company as administrator with the will annexed of the estate of Joseph H. Willets, deceased, from the estate of Arthur B. Pease, deceased, the sum of two thousand six hundred seventy-six dollars and eighty-two cents ($2,676.82), with interest at the rate of five (5%) per cent. per annum from May 14, 1912.

Clauses 6 and 7 of section 70 of chapter 3, Hurd's R. S., relating to the administration of estates are as follows:

> "Sixth. Where the deceased has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.
>
> Seventh. All other debts and demands of whatever kind without regard to quality or dignity which shall be exhibited to the court within one year from granting of letters aforesaid, and all demands not exhibited within one year as aforesaid shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate, saving however, to infants, persons of unsound mind, persons without the United States, in the employment of the United States or of this State, the term of one year after their respective disabilities are removed to exhibit their claims." (As amended by act approved May 15, 1903, in force July 1, 1903.)

It has been repeatedly held by the courts of this state that the word "trust", as used in the 6th clause, applies only to technical or express trusts, and that it has no application to trusts which the law implies as growing out of contracts. Felsenthal v. Kline, 214 Ill. 181; Svanoe v. Jurgens, 144 Ill. 507; Ford v. First National Bank, 100 Ill. App. 70; Shipherd v. Furness, 153 Ill. 590; Wilson v. Kirby, 88 Ill. 566; Jarrett v. Johnson, 218 Ill. 212. We are clearly of the opinion that the facts in this case do not establish an express or technical trust. The trial court therefore properly placed the claim in the seventh class.

The appellee insists that the law governing the only question involved in this appeal is clear and well understood, and that this court should hold that the present appeal was prosecuted for delay only, and should enforce the statutory provisions relating to appeals prosecuted for delay only. The appellants seem to have argued the appeal in good faith, and we cannot say that the appeal was prosecuted for delay.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

the following Monday the Jay Cooke Land
Grant question involved in that appeal is given, and will
undoubtedly, one first year should just give the Jamestown
Company was interested the only, but would welcome the
temporary provisions existing to elsewhere interested the early
early. The Philippine even to date edged the edged to find
Later, and we cannot any find the edged and transmitted the
order.

The Department of the District Judge T. Jack Judge
will be William.

March Term, 1913, No.
252 - 19258.

1873

CHARLES FORD LANGWORTHY,
Appellant,

vs.

STELLA PEASE HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, Deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

187 I.A. 162

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

It is conceded that the decision in this case is controlled by the decision in the case of The Merchants' Loan and Trust Company, Administrator with the will annexed of the Estate of Joseph H. Willets, deceased, v. Stella Pease Hulette, Executrix of the Last Will and Testament of Arthur B. Pease, deceased, General Number 19257, filed in this court. For the reasons stated in the opinion filed in that case, the judgment of the Circuit Court of Cook County in the present case is affirmed.

AFFIRMED.

March Term, 1913, No.
274 - 19280.

JAMES RYAN,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

187 I.A. 163

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by James Ryan, appellee, (hereinafter designated as the plaintiff) against the City of Chicago, appellant, (hereinafter designated as the defendant) for damages claimed to have been sustained by the plaintiff as the result of injuries received by him from a fall on a public side-walk on Grand avenue, in the City of Chicago, February 18, 1905. The case has been tried three times. On the first trial a verdict was returned in favor of the plaintiff for $4800. On the second trial there was a verdict of "not guilty". On the third trial there was a verdict in favor of the plaintiff for $12,700; judgment was entered upon the verdict, and this appeal followed.

The plaintiff was 49 years old at the time of the accident, and he kept a harness shop at 2049 Grand avenue. Grand avenue runs east and west, and 2049 is on the south side of the street. Plaintiff's home was over the shop. He had lived in the same place for eight or ten years prior to the accident. Two doors east of his shop was Hanson's grocery, known as "The Home Market." The side-walk in front of Hanson's grocery consisted of five flagstones, each about 8 ft. by 10 ft. There was a complete break in the second stone from the west that extended all the way across the stone, and was about the middle of the same. The break ran east and west, and each half of the flagstone sloped towards the break. The preponderance of the evidence is to the effect that the side-walk at the place of the break

March Term, 1913, No.
274 - 15380.

1874

JAMES RYAN,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

187 I.A. 163

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by James Ryan, appellee, (hereinafter designated as the plaintiff) against the City of Chicago, appellant, (hereinafter designated as the defendant) for damages claimed to have been sustained by the plaintiff as the result of injuries received by him from a fall on a public side-walk on Grand avenue, in the City of Chicago, February 18, 1905. The case has been tried three times. On the first trial a verdict was returned in favor of the plaintiff for $4500. On the second trial there was a verdict of "not guilty". On the third trial there was a verdict in favor of the plaintiff for $12,700; judgment was entered upon the verdict, and this appeal followed.

The plaintiff was 48 years old at the time of the accident, and he kept a harness shop at 2049 Grand avenue. Grand avenue runs east and west, and 2049 is on the south side of the street. Plaintiff's home was over the shop. He had lived in the same place for eight or ten years prior to the accident. Two doors east of his shop was Hanson's grocery, known as "The Home Market." The side-walk in front of Hanson's grocery consisted of five flagstones, each about 5 ft. by 10 ft. There was a complete break in the second stone from the west that extended all the way across the stone, and was about the middle of the same. The break ran east and west, and each half of the flagstone sloped towards the break. The preponderance of the evidence is to the effect that the side-walk at the place of the break

was about 2 inches below the general level of the walk at the west end of the break and about 4 inches below the general level at the east end of the break, giving the broken flagstone a pitch towards the east. It is admitted that this condition had existed for a number of years. The plaintiff had some knowledge that there was a broken flagstone in the sidewalk at the place in question but he had never given it any particular attention prior to the accident. The broken flagstone was just a little to the west of the door leading into Hanson's store. The accident occurred about 6 A.M., February 13, 1905. It was dusk at the time, the temperature was 16 degrees below zero, and there was a brisk wind from the northwest. Snow had fallen and was still falling at the time of the accident. All depressions on the sidewalk were covered by the snow. The plaintiff started east from his shop to get some breakfast rolls at Hanson's market. He was wearing rubbers and he proceeded carefully along the side-walk, keeping in the middle of the same. Just before the plaintiff reached the point to turn into the "Home Market", the front of his right foot struck in the east end of the break of the defective flagstone and against the next flagstone to the east, the latter stone being about 4 inches higher than the broken flagstone at this point. The plaintiff tripped and fell heavily to the side-walk, striking on his right leg, his right thigh and his right side. That he sustained very serious injuries as the result of the fall is abundantly proven by the evidence.

The defendant contends that "it was not negligence for the city to permit the side-walk at the time and place of the accident to be and remain in the condition it was and had been for many years prior thereto." In support of this contention

counsel refer us to certain cases holding that where the thing complained of is an adopted or accepted design or plan of a municipality, the municipality will not be liable for an accident resulting therefrom, unless the court can say as a matter of law that the method or plan of construction was dangerous. The ruling in the cases cited turned upon the principle that a municipal corporation acts judicially when it selects or adopts a plan in making public improvements. The declaration in the present case does not charge that the plan of a public improvement, viz: the side-walk, was defective or dangerous; it alleges that the city failed to keep the sidewalk at the place of the accident in good and safe repair and condition. The law in this state is that a municipal corporation must exercise ordinary care to keep and maintain its sidewalks in a reasonably safe condition. City of Chicago v. Sebeh, 136 Ill. 380; City of Mattoon v. Faller, 217 Ill. 273.

The defendant contends that the plaintiff, for a number of years prior to the accident, was aware that the sidewalk was in a defective condition at the place of the accident, and that it was contributory negligence for him to walk upon the sidewalk at the place in question. There is no merit in this contention. It is a well settled rule of law in this state that, where a man knows of the defective condition of a side-walk and walks thereon, his doing so with such knowledge is not negligence per se, as a matter of law. City of Mattoon v. Faller, supra; Dudleston v. City of Chicago Heights, 175 Ill. App. 551; Czorniak v. City of Chicago, 181 Ill. App. 360; Wallace v. City of Farmington, 231 Ill. 232. The fact that the plaintiff had a general knowledge of the condition of the side-walk at the place in question was a circumstance proper to be shown as tending to establish contributory negligence on his part, and the jury had a right to take that fact, together with all the other facts and

circumstances in evidence bearing upon the question of contributory negligence, into consideration, in determining the question as to whether the plaintiff, at the time of the accident, was in the exercise of ordinary care. The jury have found that the plaintiff was in the exercise of ordinary care at the time of the accident, and after a careful consideration of all the circumstances surrounding the plaintiff at the time of the accident, we do not feel justified in disturbing this finding.

The defendant complains of certain instructions that were given at the request of the plaintiff. We have carefully considered these instructions and we find that there is not the slightest merit in the defendant's complaint.

The defendant insists that, "instructions 5, 6, 8, 11, 12 and 13 are bad, because they submit the question of negligence of the city to the jury, whereas the undisputed evidence shows no negligence." As there was ample evidence tending to prove the averment in the declaration that the city was negligent, it would have been error for the court to have refused the instructions complained of.

The defendant complains that instruction No. 11 "tells the jury to consider the slippery condition of the sidewalk in connection with the depression, in arriving at their verdict. The record will be searched in vain for any evidence upon which to base this instruction." We are unable to agree with the defendant that there is no evidence in the case tending to prove that the sidewalk was slippery at the place of the accident, and that such condition, combined with the broken flagstone, proximately caused the accident in question. There is evidence in the record tending to support the theory of the accident upon which instruction 11 is predicated. But even if the record is as contended for by the defendant, the defendant is in no position

to complain of the alleged defect in instruction 11, for the reason that if plaintiff's instruction No. 11 is wrong in the respect complained of, the defendant's instructions 18 and 19 are chargeable with the same fault, and the defendant is therefore in no position to complain of the alleged error. O'Rourke v. Sproul, 147 Ill. App. 609; Harding v. St. L. Stock Yards, 248 Ill. 444, 454; C. & A. R.R. Co. v. Harrington, 198 Ill. 9, 25; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 620, 621.

Defendant contends that plaintiff's instruction No. 14 is bad, for the reason that there is no evidence that the plaintiff paid his physician anything for doctor's bills. Dr. Sads testified that he called on the plaintiff to attend him in the matter of his injuries seven or eight hundred times, and that the plaintiff always paid him cash for his visits.

The defendant contends that the court erred in not directing a verdict for the defendant. As there was ample evidence to sustain all of the material allegations in the declaration, it would, of course, have been error for the court to have directed a verdict for the defendant. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

The defendant contends that the plaintiff did not give the City of Chicago, the notice required by Section 7, Chapter 70, Hurd's R. S. The accident to the plaintiff occurred February 15, 1905. The statute relied upon went into effect July 1, 1905. The act does not apply to injuries sustained before the act went into effect. Weber v. City of Chicago, 147 Ill. App. 451; Neville v. City of Chicago, 154 Ill. App. 537.

The defendant contends that the amount of the damages awarded is excessive. We have very carefully considered the record with reference to this complaint, and we are unable to say that the amount awarded by the jury is manifestly against the weight of the evidence.

This case has been tried three times. The record of the last trial is unusually free from error. No complaint is made as to the court's rulings on the admission or exclusion of evidence, and the complaints made as to instructions are of the weakest kind. Finding no error in the record, the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

March Term, 1913, No.
282 - 19288.

1075

HARRY O. WHITLOCK, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
JESSIE NICKERSON WHITLOCK, Appellant.	)	COOK COUNTY.

187 I.A. 165

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellee, Harry O. Whitlock, filed a bill for divorce in the Superior Court of Cook County, charging the appellant with having committed adultery at divers times and places with a certain person named in the bill. The appellant filed a cross-bill for divorce charging the appellee with extreme and repeated cruelty. Answers were filed to said bill and cross-bill by the respective defendants thereto, denying the material allegations therein contained. The chancellor who heard the case found that the appellant had committed adultery with a certain person as charged in the complainant's bill, and a decree was entered granting the complainant a divorce and dismissing the appellant's cross-bill for want of equity. The appellant has prayed this appeal from the decree. Appellant urges that the chancellor erred: first, in finding the appellant guilty of adultery, and in awarding the appellee a decree of divorce on that ground; second, in dismissing the appellant's cross-bill for want of equity.

The main contention of the appellant is that the evidence does not sustain the finding of the chancellor that the appellant was guilty of adultery as charged in the bill. Orally, and in briefs, the counsel for the appellant have argued this contention with great force and earnestness. Our attention is called to the stigma that the decree casts on the young wife and her children. With a full appreciation of the seriousness

of the case, we have carefully studied the record to ascertain if the evidence supports the finding of the chancellor. Many witnesses testified for and against the appellant, and the record is a lengthy one. The chancellor appears to have tried the cause fairly and to have paid close attention to the witnesses and the testimony. No complaint is made by either side as to his rulings in the matter of the admission or exclusion of evidence, and no suggestion is made by either side that he showed the slightest bias or prejudice during the hearing of the cause. The chancellor, in his opinion, deciding the case, showed sorrow for the appellant and her children and a keen appreciation of the effect of his finding. He clearly indicated that the finding he felt obliged to make, under the evidence and the law, involved a most unpleasant duty and one that he would be glad to avoid if he could properly do so. The chancellor saw the witnesses and heard them testify and he had a very much better opportunity to determine their credibility than we have. Under such circumstances, it is the settled law of this State that a court of review will not disturb the findings of fact of a chancellor, unless it is apparent that clear and palpable error has been committed. Zimmerman v. Zimmerman, 342 Ill. 582, and cases there cited. The present case on questions of fact was a hotly contested one, and the chancellor was necessarily compelled to study closely the different witnesses who testified. In his opinion he speaks of the appearance of the witnesses and the impression that certain important witnesses made upon him. He states that the alleged paramour of the appellant made a very bad impression upon him, although his testimony was not self-contradictory in any important particular, and the chancellor aptly explains his impression of the witness by the statement that his testimony did not ring true. We have nothing but the cold record before us. In it we find abundant evidence

to sustain the finding of the chancellor that the appellant committed adultery on September 21, 1911, as charged in the bill of complaint, and there is nothing in the proof that would warrant us in holding that the finding of the chancellor was clearly and palpably against the weight of the evidence. On the contrary, after a careful and conscientious review of all the testimony, we have arrived at the conclusion that the finding of the chancellor that the appellant was guilty of adultery as charged was just and proper. As no useful purpose would be served in detailing the many facts and circumstances that have forced us to this conclusion, the nature of the evidence itself amply justifies us in avoiding an unnecessary recitation of the same.

Counsel for the appellant strenuously insist that it was proven conclusively that the testimony of Mary Whitlock to the effect that she witnessed an act of adultery committed by the appellant and the person named in the bill was perjury, for the reason that it was demonstrated that it was a physical impossibility for her to have seen what she claimed to have seen in reference to the alleged act. We have appreciated fully the importance of this testimony of Mary Whitlock, and we have carefully studied it together with all the testimony that was introduced in contradiction and in support of the same, and we cannot say that the proof shows that Mary Whitlock did not see the alleged act of adultery as testified to by her.

Counsel for the appellant, somewhat perfunctorily, have argued that the chancellor should have awarded the appellant a decree of divorce on her cross-bill. As we have found that the finding that the appellant was guilty of adultery as charged in the original bill was proper and justified, it follows that the action of the chancellor in dismissing her

cross-bill was justified, for where it appears that the party seeking a divorce on the ground of extreme and repeated cruelty has been guilty of adultery, she will not be granted a divorce, and the fact that the husband has been guilty of extreme and repeated cruelty is not a sufficient recriminatory defense to a bill by him for divorce on the ground of adultery. Zimmerman v. Zimmerman, supra; Bast v. Bast, 82 Ill. 584; Stiles v. Stiles, 187 Ill. 576. We do not wish to be understood as holding that the proof sustained the charge of cruelty.

Finding no error in the record, the decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

ch Term, 1914. No.

294 - 20228.

THE CITY OF CHICAGO, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
ATTILIO BRAGGIO, Plaintiff in Error.	)	OF CHICAGO.

187 I.A. 166

PER CURIAM. This is a motion of defendant in error to strike from the record the statement of facts filed herein and to affirm the judgment. It appears from the transcript of the record that the suit in the Municipal Court was an action brought for the recovery of a penalty for the violation of an ordinance of the City of Chicago forbidding the sale of cigarettes to minors; that personal service was had upon the defendant, a jury trial, a verdict finding the defendant guilty, and assessing a fine of $25; that a judgment was entered upon such verdict on January 13, 1914; and that on February 18, 1914, the judge, before whom the case was tried, signed and placed on file a "correct statement of facts."

The sixth paragraph of section 25 of the Municipal Court Act provides, with reference to cases of this character, "upon application made at any time within thirty (30) days after the entry of any final order or judgment, or within such further time as may, upon application therefor within said thirty days, be allowed by the court, it shall be the duty of the judge by whom such final order or judgment was entered, to sign and place on file in the case in which the same was entered, if so requested by either of the parties to the suit, either a correct statement, to be prepared by the party requesting the signing of the same, of the facts appearing upon the trial thereof, and of all questions of law involved in such case, and the decisions of the court upon such questions of law, or, if such party shall

1871 A. 166

so elect, a correct stenographic report," etc. Under this section it was the duty of the party desiring to have such a statement of the facts signed and placed on file to make application therefor within thirty days after the entry of the judgment, or to apply within such thirty days for further time to do so. There is nothing in the record to show that any such application was made within thirty days after the entry of the judgment, and it affirmatively appears that the statement of facts which was signed by the judge was not signed or placed on file by him until thirty-one days after the judgment was entered. At that time he had no power to sign such a document, and the motion to strike must therefore be allowed. Wurlitzer Co. v. Dickinson, 247 Ill. 27; Byington v. Chandler, 171 Ill. App. 432; Pauley v. The King-Richardson Co., 174 Ill. App. 307.

It is suggested that because the thirty days allowed by the statute expired on Lincoln's birthday, that day should not be counted. The statute provides that "the time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday, then it also shall be excluded." (Hurd's Rev. Stat., Chap. 131, Sec. 1.) The 12th day of February, 1914, did not fall on Sunday. The section of the statute which makes that day a holiday is contained in the chapter on Negotiable Instruments (Hurd's R. S. Ill., Chap. 98, Sec. 17). It provides that certain days, among others the 12th day of February, "are hereby declared to be legal holidays * * * and shall, for all purposes whatsoever, as regards the presenting for payment or acceptance, the maturity and protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes and other negotiable or commercial paper or instruments, be treated and is considered as is the first day of the week,

com only called Sunday." There is nothing in that section, or elsewhere in the statute, so far as we are advised, which requires the 12th day of February to be treated as a Sunday, for any other purpose than the purposes thus stated. Hence under the statute, that day must be included in the computation of the time allowed by the statute. Apparently no request for any extension of time was made within such thirty days, as might have been made and allowed, under the statute.

The only errors assigned are such as cannot be considered in the absence of a statement of facts. The judgment will therefore be affirmed.

AFFIRMED.

March Term, 1913, No.
369 - 19383

1078

MANUFACTURERS MERCANTILE COMPANY, a corporation,
Appellant,

vs.

MONARCH REFRIGERATING COMPANY OF CHICAGO, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

187 I.A. 173

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The decision in this case turns on the question whether certain warehouse receipts are negotiable or non-negotiable. On a former appeal it was held by the Branch Appellate Court that the receipts were non-negotiable and the judgment for the plaintiff was reversed and the cause remanded. Manufacturers Co. v. Monarch Co., 169 Ill. App. 562. On the second trial the Court, on the ground that the judgment on the former appeal was binding, directed a verdict for the defendant and from a judgment on the verdict the plaintiff prosecutes this appeal. The evidence was substantially the same on both trials, the differences are unimportant and do not affect the controlling question in the case. The law of the case as announced on the former appeal is the law of the case both for the trial Court and for this Court.

On a comparison of the records on the two appeals, we are of opinion that the trial Court properly directed a verdict for the defendant, and the judgment is affirmed.

AFFIRMED.

Tinned,

Lastly, advice all the members, and the friends in Glasgow, we are at opinion that the next round meeting should be held on a Wednesday at the theatre on the 1st day of next Lent, 1st-4th Sunday.

The secretary of the Dinner Agency in the City of the Holy Land announced the following resolution to the Board. The Law of the Land is that all citizens, the difference and nationality the same in each city. The religious and nationality the same in each city. The religion and nationality the same in each city. Under this agency. The religion and nationality the same in each city. Under this agency. The religion and nationality the same in each city.

Tinned, Lastly, advice all the members, and the friends in Glasgow, we are at opinion that the next round meeting should be held on a Wednesday at the theatre on the 1st day of next Lent, 1st-4th Sunday.

The secretary of the Dinner Agency in the City of the Holy Land announced the following resolution to the Board. The Law of the Land is that all citizens, the difference and nationality the same in each city. The religious and nationality the same in each city. The religion and nationality the same in each city. Under this agency. The religion and nationality the same in each city. Under this agency. The religion and nationality the same in each city.

October Term, 1913. No.
90 - 19472

1077

THE CITY OF CHICAGO,
Defendant in Error,

vs.

JOHN D. ROWE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 175

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

In a suit by the City of Chicago against plaintiff in error Rowe to recover a penalty for a violation of an ordinance of the City of Chicago in relation to Disorderly Conduct, the City recovered a judgment for $1.00 and costs, to reverse which Rowe prosecutes this writ of error.

The Court instructed the jury that in arriving at their verdict before they could find the defendant guilty they must do so by a clear preponderance of the evidence. The Court instructed the jury orally, the defendant made no request for any instruction nor any objection or exception to the instruction given. He now urges as the ground of reversal that the Court should have instructed the jury that the plaintiff was bound to prove its case beyond a reasonable doubt. If it be admitted that the question is saved for review, we think the plaintiff was not bound to prove its case beyond a reasonable doubt. In actions to recover a penalty for the violation of an ordinance or statute, there must be more than a mere preponderance of the evidence, but it is not necessary that the evidence should establish the violation of such statute or ordinance beyond a reasonable doubt. To warrant a verdict for the plaintiff there must be a clear preponderance of the evidence in favor of the plaintiff. Webster v. The People, 14 Ill. 365, was an action to recover

a penalty provided by statute for peddling without a license, and it was held that the evidence was sufficient to warrant a verdict for the plaintiff, although a doubt might still remain, and that the Court did not err in refusing to instruct the jury that, "if the jury entertain a reasonable doubt of the guilt of the defendant Webster, then they ought to find a verdict of not guilty." In Lewiston v. Proctor, 27 Ill. 414, it was held in a suit for a penalty for violation of an ordinance, that every averment must be established by a clear preponderance of the evidence, but it was error to instruct the jury that they must be satisfied of defendant's guilt bey nd a reasonable doubt before they could find against him. In Ruth v. Abington, 80 Ill. 418, it was held that in an action to recover a penalty for the violation of a town ordinance, it was not necessary that a jury be satisfied of the guilt of the defendant beyond a reasonable doubt, but it was error to instruct the jury that a preponderance of evidence only was required to convict.

See also, Sloan v. People, 108 Ill. App. 545;
Palmer v. People, 109 id. 269;
Indiana Millers F. Ins. Co. v. People,
65 id. 355.

We perceive no objection to the instruction given, and the judgment is affirmed.

AFFIRMED.

October Term, 1913. No.
163 - 19552

THOMAS LINDSKOG,
Defendant in Error,

vs.

CONRAD SEIPP BREWING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 180

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

Plaintiff Lindskog entered into a contract in writing with Laura Robinson whereby she appointed him her attorney to prosecute a claim for personal injuries against the defendant Brewing Company, and it was agreed that he should receive fifty per cent. of the gross amount realized out of such claim if settled with his approval in writing, otherwise a reasonable sum of money for his services, "and at all events not to be less than said per cent." Lindskog gave proper notice of such contract to the Brewing Company. Miss Robinson gave Lindskog notice that she did not require his services any longer and then settled with the Brewing Company and was paid by it five hundred dollars in satisfaction of her claim.

On the authority of Standidge v. Ry. Co., 254 Ill. 524, we hold that while the contract with Lindskog did not affect Miss Robinson's right to settle her claim with the Brewing Company, that Company, having notice of the contract between her and Lindskog, was, in case the lien was ignored, required to account to him in an action at law for the amount of such lien.

We think the agreement between the parties, as shown by this written contract, was that in any event Lindskog should receive not less than fifty per cent of the amount

realized out of the claim. The judgment is for fifty per cent. of the amount paid by the Brewing Company to settle the claim, and the question of what was a reasonable fee for plaintiff's services was outside of the issues in the case.

Sutton v. Chicago Ry. Co., 174 Ill.App.318;
S. C. 258 Ill. 551.

We think the judgment is right and it is affirmed.

AFFIRMED.

October Term, 1913. No.
213 - 19603

JOSEPH BINDER,
Defendant in Error,

vs.

MARY A. ROBERTS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 181

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment for $168 recovered by the plaintiff, Binder, against the defendant, Mary A. Roberts. The original statement of claim is for an account stated for work done and materials furnished for defendant's automobiles. The amended statement of claim is based on alleged fraudulent representations made by one Shea, whereby plaintiff accepted his note for the balance due for the work done and materials furnished on the said automobiles. The allegations of the statements of claim are traversed by the affidavits of defence. There is in the record no evidence tending to support the allegations of either the original or amended statement of claim, nor any evidence to warrant or support a recovery by the plaintiff in any form of action. It was stipulated that defendant was the owner of the automobiles at the time plaintiff repaired them, but there is in the record no evidence tending to show that such repairs were made at her request. Plaintiff testified that Shea brought the machines to his shop; that he did the work for Shea; that in payment therefor Shea paid him a certain amount of money and gave him his note for the balance due of $168. This note the plaintiff procuded and offered in evidence at the trial. There is also evidence tending to show

that Shea was in the employ of the defendant and that she told him to go to plaintiff and pay part of the amount due him in money and give his note for the remainder; but there is no evidence that Shea made any representations to plaintiff as to his financial condition.

The evidence we think fails to show that the defendant was ever liable to the plaintiff for the repairs made by him on her machines, but if it be admitted that she was liable, the plaintiff accepted in payment of the balance due him for such repairs the note of Shea, payable t plaintiff's order and thereby the amount due him from the defendant was paid.

The judgment of the Municipal Court is reversed.

REVERSED.

October Term, 1913. No.
231 - 19622

FRANK H. REDA,
Defendant in Error,

vs.

G. H. HAMMOND COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 182

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

A touring car of the plaintiff Reda collided with an auto truck of the defendant Company at a street intersection. For the damages to his car the jury awarded the plaintiff $325 damages and to reverse a judgment on the verdict the defendant prosecutes this writ of error. The only ground of reversal urged is that as the machine of the plaintiff was repaired, evidence of estimates of the cost of making such repairs was not admissible, but the recovery must be based on evidence of the cost of making such repairs. The machine of the plaintiff was out of repair when the collision occurred and plaintiff had the repairs made thereon made necessary by such condition, as well as those made necessary by the injuries resulting from the collision. Plaintiff gave evidence of the injuries to his machine and of the cost of repairing it, and defendant offered no evidence either of the injuries to plaintiff's machine or the cost or expense of repairing it. Heile, the manager of the concern that repaired the machine, testified to the repairs made and as to the expense of making the repairs made necessary by the collision. We think such testimony was admissible and is not to be regarded as an estimate of the cost of such repairs made before the repairs were made. We also think that from the testimony the jury might properly find that the expense of making the repairs on plain-

tiff's machine made necessary by the collision amounted to the amount of the verdict.

The judgment is affirmed.

AFFIRMED.

FIGS.* sensitive areas connected to the detecting apparatus c-
the memory of the monitor.

the Dolphins in relief.

FIG.*

260 - 19655

ETTA WALSH, JOSEPH WALSH and JAMES WALSH, copartners and doing business as JAMES WALSH AND COMPANY,
Defendants in Error,

vs.

GEORGE J. COOKE COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant Company for hauling brick bats and cinders for the defendants. The contention of the plaintiffs was that the contract was that defendant should pay plaintiff $1.75 per load for hauling brick bats, $1 per load for hauling cinders, if defendant procured for plaintiff the right to take the same to Jackson's dump, or $1.50 per load if the cinders were taken to plaintiff's dump. The contention of defendant was that it was agreed that plaintiff should haul the brick bats and cinders for $40.00 if plaintiff threw them into the alley, and that plaintiff did throw them into the alley. Upon this question the evidence was conflicting and the verdict must be held conclusive.

The amount of material hauled is also in dispute, but we cannot say that the jury might not properly find that the defendants hauled the number of loads they claimed to have hauled, and that they were entitled to recover $163.75, the amount of the verdict and judgment therefor.

We find no reversible error in the rulings of the Court on questions of evidence, and the judgment is affirmed.

AFFIRMED.

292 - 19690

FRED GEHM, Defendant in Error, vs. GEORGE STARK, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Gehm in his amended statement of claim states that his claim against defendant Stark, "is for services and commissions due in negotiating a real estate transaction between defendant and Lilian Binder, wherein plaintiff secured the said Binder to sell to the defendant the property at 2255-57 Belmont Avenue, Chicago", etc. The defendant in his statement of defense denied that plaintiff negotiated such real estate transaction or that he secured Binder to sell to him the property in question. Plaintiff testified that in March, 1912, defendant told him that he would like to buy the property in question at $8500 and asked plaintiff to see what he could do; that he saw Binder, who asked $10,000 for the property; that he so reported to defendant, who told him to offer $9000; that he did so by telephone and Binder refused the offer and he so reported to defendant and told him that he could not buy the property for $9000; that some weeks later he told defendant that he was still working on the trade and defendant told him to go ahead, take his time, there was no hurry. In May defendant told Lawkus, a lawyer's clerk, that he would like to buy the property. Lawkus called the matter to the attention of Redwanz, a real estate broker, who in a few days bought the

property for defendant for $9500. The case was submitted to the Court and there was a finding and judgment for the plaintiff for $100, to reverse which the defendant prosecutes this writ of error.

It is unusual for a purchaser of real estate to pay commissions. The broker, according to the customary mode of transactions, receives his commissions or other compensation from the seller. If a proposed buyer expressly agrees with a broker to pay him commissions if he buys for him certain property at a certain price, no doubt if the broker buys the property at the price given him, the defendant is liable to pay him the usual and customary commissions for making such purchase. But in this case the plaintiff did not negotiate the purchase of the real estate in question. He procured from the owner an offer to sell for $10,000, and he was authorized by the defendant to offer $9000. This left the parties $1000 apart, and in bringing them together he took no part. A broker's commission is earned only when he procures a buyer, if he represents the seller, or a seller if he represents the buyer, who will comply with the terms and conditions of sale fixed by the principal. Defendant in error does not contend that he was entitled to commissions, but contends that he was entitled to recover on a quantum meruit, and that the amount of the recovery is less than the evidence shows that he was entitled to recover.

The only evidence for plaintiff as to the value of his services was his testimony that he was in the real estate business and that "the usual and customary charges for negotiating a real estate transaction such as he negotiated" was $237.57. But , as has been said, plaintiff

did not negotiate the transaction between Binder and defendant, and his testimony as to the usual charges for negotiating such a transaction is of no value. There is in the record no testimony as to the reasonable value of plaintiff's services, and we are unable to see how the trial Court arrived at the conclusion that plaintiff was entitled to recover $100.

An award of damages must be supported by legal evidence. We find in the record no evidence to support the judgment, and the judgment is reversed.

REVERSED.

October Term, 1913. No. 260 - 19655

1967

ETTA WALSH, JOSEPH WALSH and JAMES WALSH, copartners and doing business as JAMES WALSH AND COMPANY,
Defendants in Error,

vs.

GEORGE J. COOKE COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 184

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant Company for hauling brick bats and cinders for the defendants. The contention of the plaintiffs was that the contract was that defendant should pay plaintiff $1.75 per load for hauling brick bats, $1 per load for hauling cinders, if defendant procured for plaintiff the right to take the same to Jackson's dump, or $1.50 per load if the cinders were taken to plaintiff's dump. The contention of defendant was that it was agreed that plaintiff should haul the brick bats and cinders for $40.00 if plaintiff threw them into the alley, and that plaintiff did throw them into the alley. Upon this question the evidence was conflicting and the verdict must be held conclusive.

The amount of material hauled is also in dispute, but we cannot say that the jury might not properly find that the defendants hauled the number of loads they claimed to have hauled, and that they were entitled to recover $163.75, the amount of the verdict and judgment therefor.

We find no reversible error in the rulings of the Court on questions of evidence, and the judgment is affirmed.

AFFIRMED.

October Term, 1913. No.

292 - 19690

FRED GEHM,
Defendant in Error,

vs.

GEORGE STARK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 185

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Gehm in his amended statement of claim states that his claim against defendant Stark, "is for services and commissions due in negotiating a real estate transaction between defendant and Lilian Binder, wherein plaintiff secured the said Binder to sell to the defendant the property at 2255-57 Belmont Avenue, Chicago", etc. The defendant in his statement of defense denied that plaintiff negotiated such real estate transaction or that he secured Binder to sell to him the property in question. Plaintiff testified that in March, 1912, defendant told him that he would like to buy the property in question at $8500 and asked plaintiff to see what he could do; that he saw Binder, who asked $10,000 for the property; that he so reported to defendant, who told him to offer $9000; that he did so by telephone and Binder refused the offer and he so reported to defendant and told him that he could not buy the property for $9000; that some weeks later he told defendant that he was still working on the trade and defendant told him to go ahead, take his time, there was no hurry. In May defendant told Lawkus, a lawyer's clerk, that he would like to buy the property. Lawkus called the matter to the attention of Redwanz, a real estate broker, who in a few days bought the

property for defendant for $9500. The case was submitted to the Court and there was a finding and judgment for the plaintiff for $100, to reverse which the defendant prosecutes this writ of error.

It is unusual for a purchaser of real estate to pay commissions. The broker, according to the customary mode of transactions, receives his commissions or other compensation from the seller. If a proposed buyer expressly agrees with a broker to pay him commissions if he buys for him certain property at a certain price, no doubt if the broker buys the property at the price given him, the defendant is liable to pay him the usual and customary commissions for making such purchase. But in this case the plaintiff did not negotiate the purchase of the real estate in question. He procured from the owner an offer to sell for $10,000, and he was authorized by the defendant to offer $9000. This left the parties $1000 apart, and in bringing them together he took no part. A broker's commission is earned only when he procures a buyer, if he represents the seller, or a seller if he represents the buyer, who will comply with the terms and conditions of sale fixed by the principal. Defendant in error does not contend that he was entitled to commissions, but contends that he was entitled to recover on a quantum meruit, and that the amount of the recovery is less than the evidence shows that he was entitled to recover.

The only evidence for plaintiff as to the value of his services was his testimony that he was in the real estate business and that "the usual and customary charges for negotiating a real estate transaction such as he negotiated" was $237.57. But , as has been said, plaintiff

did not negotiate the transaction between Binder and defendant, and his testimony as to the usual charges for negotiating such a transaction is of no value. There is in the record no testimony as to the reasonable value of plaintiff's services, and we are unable to see how the trial Court arrived at the conclusion that plaintiff was entitled to recover $100.

An award of damages must be supported by legal evidence. We find in the record no evidence to support the judgment, and the judgment is reversed.

REVERSED.

FINDING OF FACT.

The Court finds as a fact that it does not appear from the evidence that the defendant, George Stark, was indebted in any sum to the plaintiff, Fred Gehm, when this suit was brought.

October Term, 1912. No.
466 - 18937

1088

OTTO F. HASCHKE,
Appellee,

vs.

WILLIAM F. KLEMP,
Appellant.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

187 I.A. 213

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The defendant and appellant in this cause, William F. Klemp, in December, 1908, made a contract with the Sanitary District of Chicago for erecting certain steel poles to carry electricity transmission wires from Fullerton avenue in Chicago northerly to Wilmette. He was to receive a certain sum for each pole set, $29.50 for a forty-five foot pole and $28.50 for a 50 foot pole, there being some of each length provided for. He sublet the work to the plaintiff and appellee, Otto F. Haschke, who agreed to do it according to the plans and specifications governing the contract between the Sanitary District and Klemp, for $16 for each pole, irrespective of the length, to be paid as the District paid Klemp.

There was, due to the season, delay in completing the work beyond the time contemplated by the specifications, and Haschke did not finish all the work which Klemp had contracted to do, Klemp undertaking a portion of the work himself after June 1, 1909. There is no question made in this cause, however, on the entirety of the contract nor on the delay. Haschke erected 137 poles, which would amount to $2192. He claimed also for work which he alleged was extra labor outside of his contract, $456.85, making $2648.85 as the whole amount which Klemp should pay him. Of this $1000 was paid directly or on his order and account before this suit was begun in the Municipal Court of Chicago September 28, 1911, leaving

$1648.85, which he maintained was due him.

Klemp obtained a final settlement and payment from the Sanitary District in January, 1911, but Maschke was unable to obtain a settlement with Klemp or any payment further than the thousand dollars, and therefore brought suit. Of the $456.85 claimed for extra work Klemp contested on sundry grounds $419.00. Had he claimed no set off or recoupment, this would have left him admitting an indebtedness of $1429.65 to Maschke. But Klemp did set up as a recoupment a claim of more than this amount as "The cost of altering, repairing and finishing defective work in resetting of 136 poles to make same comply with the contract."

The cause was submitted to a jury and much evidence, oral and documentary, was heard resulting in a record brought to this Court on the appeal of almost six hundred typewritten pages. The jury found for the plaintiff for the full amount he claimed, thus deciding against the defendant both on his negative contention regarding the claimed extras and on his affirmative contention as to the sums which were claimed as a recoupment.

The Court below, however, according to a statement in appellant's argument, holding that there was a defect of proof as to $69.34, required a remittitur to that amount as a condition of judgment upon the verdict. At all events the plaintiff did so remit that amount and judgment was then given in his favor against the defendant for $1579.51, from which judgment the defendant appealed to this Court.

The appellant contends that the Court below erred in some rulings on evidence and made in one instance a remark before the jury placing an erroneous construction on the contract. But his chief emphasis in this Court is placed on the proposition that the verdict was against the clear weight of the evidence.

We have examined the record with attention to both these complaints, and see nothing which would warrant us in interfering with the verdict and the judgment which, with slight modification, followed it. The rulings on evidence we do not think contained any reversible error, nor do we think that the remark about the "guying" not being covered by the contract for "setting" the poles, in the connection in which it was made and concerning the small item which was then under discussion, is any reason for reversing the judgment or supposing the plaintiff did not have a fair trial. After the Court had made the remark, the plaintiff withdrew his objection to the testimony which had been offered and received, and the Court said, "Very well, let it go in."

Nor does the fact greatly impress us that in considering these controverted items for extras, and the items made in the counter claims, item by item, the jury made, as to two or more minor ones, an apparent mistake as to the presence of sufficient or definite evidence to sustain them. For example, considering the whole controversy together and the conflicting claims made by the parties, it did not show "passion or prejudice" as defendant argues, that the jury, after hearing the plaintiff say that he had charged $44.45 for certain extra concrete at $7.5[illegible] a cubic yard, forgot that under vigorous cross-examination he said that he could not "tell us" how many extra cubic feet he used on that item. Even had the Court not required, or the plaintiff made, the remittitur, we should hardly have considered it as fatal. We do not see any indication of passion or prejudice on the part of the jury, nor any clear preponderance of evidence against the determinations to which they came, either on the defence to the case of the plaintiff or on the affirmative contentions of the defendant in the recoupment.

There were undoubtedly matters fairly in dispute concerning the character of the work. In a job at once of considerable magnitude and much detail and extent there usually are. But there is no reason to suppose the jury did not give the questions fair consideration. They undoubtedly placed much importance on the report of the Sanitary District Inspector (which he said on the stand in this case was true when he made it and was true when he was testifying) that the erection of the poles was "an exceptionally good piece of work."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

October Term, 1912. No.
504 - 18975

1089

ANNE HAROLD MARTIN,
Appellee,

vs.

ADAMS EXPRESS COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

187 I.A. 214

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This judgment must be reversed and the cause remanded. Even on the assumption that the rulings of the Municipal Court on the matter of the limitation of damages for the coral jewelry which it is conceded was confided to the defendant by the plaintiff and lost through the fault of the defendant, were correct, we are of opinion there was no evidence of the value of the said jewelry sufficient to warrant a jury in finding the verdict on which the judgment of $2500, appealed from, was entered. The testimony on which this estimate of damages or value was based was as follows:

Mr. Martin, the father of the plaintiff, testified that he gave the jewelry to the defendant for carriage from Chicago to Philadelphia. He says that in the box he left with the company was a lot of miscellaneous jewelry which had considerable value, but the items and value of which he could not state; that with this miscellany, however, was a set of coral jewelry, a necklace with a cross attached and two bracelets; that this set was made up of coral which he had originally bought in 1869, or thereabouts, and had made into the necklace and cross and bracelets; that there were about two hundred pieces of coral in them, "very well matched", "almost all alike", "of a very fine pink tint" and "of very rare quality of coral, such coral as you could barely find

in the city jewelry stores like Chicago's." He further testified that he could not say where the coral came from; that he bought it from an individual and had it made up into jewelry.

The plaintiff herself testified that the corals were on a double strand, were of uniform size, and that they were "pink on the shade rather towards the yellowish pinkish tinge."

To establish the value of the goods on this description, the plaintiff put on the stand an expert, who was familiar with the trade in corals, and the value of coral jewelry, and he was asked this question:

"Assume that we have about 200 corals about 3/8 of an inch in diameter each, a light pink and well matched in strands, do you know what the fair, reasonable market value of such coral is was in Philadelphia on or about December,1926?"

This question was objected to on the ground that it did not contain the description of the purported article in question, and on the ground that it did not contain all the essential elements and was indefinite in other respects, and that it contained the term "well matched" without defining its meaning.

The witness, beginning to answer "I should think", was stopped by the Court and told to answer "Yes or no". Answering "Yes, I know", he was asked "What was that fair, reasonable market value?" The witness then began again, apparently to qualify his answer, saying:

"Before I can answer that question more definitely, I would say that if we assume that we have 200 well matched and light pink"-

when he was interrupted by the Court with evident impatience, who said -

"Now answer just according to the question asked you, assume nothing else but what he has asked."

Thus pressed the witness said "I should value that

from $12 to $15 each coral", "about $3[illegible] when they are made up in a necklace or some other jewelry."

But on cross-examination the witness said that the value of corals varies very much with the color, and being shown a coral necklace and his attention being called to the fact that the corals were of a light pink color, he said that they were not fine corals; that 200 of such corals of the 5/8 inch size would be worth only between $75 and $100; that the fact that they were light pink in color made no difference in his opinion, because the color had "a salmon pink in it which is only found in inferior corals, the same as deep red", and that "those things must not exist in coral to make them of value;" that stone experts never judged stones except in a light they chose themselves; that white corals were sometimes stained so that they could not be told except by breaking them or by "a magnifying examination, not with the naked eye"; that "salmon pink" is a pink that is charged with yellow; that to be very valuable corals must be very well grained; that "being well matched, they must have that beautiful grain, you know, that goes with it;" that it makes a difference in value what country the corals come from; that "yellowish pink" corals would be easy to find and match in Chicago, and would be cheaper than pink not yellowish; that to be valuable, "Besides the color the coral also must have the beautiful fine grain that shows just under the pink". He said other things also, showing, that, as is a matter of general knowledge, the valuation of precious stones or corals is an affair of delicacy and difficulty. The defendant moved to strike out his testimony "as not bearing on the corals in question and being based on an insufficient description of them." The motion was denied.

We think that consideration of this evidence,

which is all that was offered concerning value, at the most only establishes that the corals that were lost might have been worth $2500 if they were of a particular quality, shade and grain, which they possibly were. Certainly to our minds it did not establish nor really tend to establish, especially considering the plaintiff's own testimony, that they were worth any such sum.

Taken in connection with the facts on which the appellant remarks, concerning the nonchalant not to say careless manner in which the jewelry and the box containing it were treated by Mr. Martin (the only witness as to its great beauty and rarity) before and at the time of the delivery to the defendant, we find it very difficult to believe that it had that value. If it did have it, it was not proven.

We think also the Court erred in refusing to admit in evidence the letter of the plaintiff's father, her principal witness, and, as we hold, her agent in the matter of her claim against the Company. This letter of February 9, 1909, stated the grievance of the plaintiff in not receiving the package or any information concerning it, indicated that legal proceedings were in contemplation and contained this paragraph:

"I have heretofore upon request of your Manager given a description of the principal articles contained in the package, namely, one coral necklace, one coral cross and two coral bracelets of the value of ($250) Two Hundred and Fifty Dollars."

The plausible argument is made by appellee to justify the Court's ruling that Mr. Martin had no authority to write the letter or bind the plaintiff. Apart from the consideration that we have suggested, that in our opinion Mr. Martin must be considered the agent of the plaintiff to make the investigation and claim against the Company, and that his

admission is therefore relevant, the letter in our opinion was competent as impeaching Martin's testimony as to the quality of the jewelry and his offering a reward of $500 for its recovery. We are mindful of the fact that he did not directly state any value in his testimony, but what he said about the quality of the jewelry was made the basis of the only valuation that was made in the case on behalf of the plaintiff. Direct contradiction is not necessary to make matter competent as impeachment. Inconsistency is sufficient.

Stecher v. People, 217 Ill. 348;

Wilson v. Genseal, 113 Ill. 433;

Foster v. Worthing, 146 Mass. 607.

We should not perhaps deem the inflammatory language of the counsel in his argument, ruled upon as it was by the Court, sufficient by itself to require a reversal; but it certainly does not tend to make us more inclined to be satisfied that this judgment was just. To speak "of the war that is waged by express companies of this country and in our State of Illinois against the individual" was a marked instance of improper suggestion to a jury, and the Court's subsequent ruling and remarks about it were hardly as pronounced as they should have been in reprobating it.

Having thus given the grounds on which we place our decision, it may be considered superfluous to discuss the important question raised in this cause concerning the limitation of liability by the receipt or "non-negotiable bill of lading" which the plaintiff's father took for the goods when delivered to the Express Company. If a new trial should take place it will undoubtedly, however, again arise, and on certain of the factors in it the same necessity for rulings will appear as before. We shall therefore speak of one of them, leaving, however, open those matters on which the

record is likely to be fuller or different.

The receipt contained the following provision as one of the conditions on which the company agrees to carry the goods, and as the receipt expresses it, "to which the shipper agrees and as evidence thereof, accepts this bill of lading."

1. In consideration of the rate charged for, carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the Company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

No value was stated in the receipt.

It is conceded on the one hand that except for the provisions of the so-called "Carmack Amendment" (passed by the Congress in 1906) to the Inter State Commerce Act of the United States, the carrier's liability would not, under the law of Illinois, be limited by this provision unless, at least, the Company showed express assent on the part of the shipper outside of the acceptance of the receipt.

On the other hand it is conceded by the plaintiff that by virtue of the present federal law, the validity of this provision purporting to limit liability must be determined without reference to the law of Illinois, provided the conditions necessary to give to the Company the advantage of the Federal law have been met by it. She admits that the decisions of the United States Supreme Court establish that "where there are two or more established rates based upon differences in value, the valuation 'declared or agreed upon' fixes the legal rate, and such valuation becomes binding on both shipper and carrier."

Adams Express Company v. Croninger, 226 U. S. 491;

Kansas City Southern Ry. Co. vs.Carl,

227 U. S. 639.

But, says the plaintiff in argument -

"Here there is no competent proof and in fact no proof whatever, as to the legal rate in force on December 7, 1908, upon the shipment in question, nor any proof that there were two or more rates then in force based upon differences in values, nor that the rate actually paid by the plaintiff was based upon a limited valuation, nor any proof that any rates were actually filed with the Interstate Commerce Commission, as required by law."

Further she contends -

"that the limitations of liability in the shipping receipt were not applicable, for the reason that unfair advantage was taken of the plaintiff in securing the same."

Whether the proof thus said by the plaintiff to be necessary to make the limitation valid, is, as a matter of law necessary, or whether, as defendant argues, "the introduction in evidence of the receipt alone was sufficient evidence of the consideration in the schedule rates", and whether there was any evidence warranting a jury in finding that "an unfair advantage was taken of the plaintiff", we abstain expressly from deciding. It is quite possible that "out of greater caution" on the part of one or both of the parties, additional or different evidence on these matters may be offered on another trial and other instructions tendered, applying thereto.

Nor do we decide whether the testimony of Hutchinson, offered by the defendant, was sufficient to make the proof,which the plaintiff declares necessary, of the differentiated rates, nor whether that testimony, in connection with the copy of the "classification and Tables of Graduated Charges No. 17 applying on all business carried by the lines of the Adams Express Company" and marked Defendant's Exhibit 8, would have been sufficient to bring the Company within the

protection of the Federal statute without the further evidence which the plaintiff insists was requisite. But we think it proper to note our opinion that the Court erred in excluding exhibit 8. It was certified by the Secretary of the Commission under date of April 1, 1908. The Inter State Commerce Act made it competent evidence if it were not so at common law.

The point made by the plaintiff that the certificate of the Secretary of the Commission was under date of April 1, 1908, and therefore was no evidence that the schedule was in force December 7, 1908, the date of the shipment, is not good. It is exactly one of those cases in which the existence of a regulation at a certain time raises the presumption that it existed at a time subsequent thereto - a presumption that is good until overthrown.

St. Louis, Alton and Terre Haute R. R. Co.,
vs. Eggman, 161 Ill. 155.

If without "the basing book" it was not sufficient for the purpose for which it was offered, as counsel for appellee contend, it was competent nevertheless as a part of the proof. One is not required to prove his whole case at once.

The judgment of the Municipal Court is reversed and the cause remanded to that Court.

REVERSED AND REMANDED.

March Term, 1913, No.
85 - 19076

1090

NELLIE LOEB,
Defendant in Error,

vs.

BLANCHE YOVIN,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

187 I.A. 216

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case (defendant in error in this Court), Nellie Loeb, sued the defendant (the plaintif in error in this Court), Blanche Yovin, in the Municipal Court of Chicago November 21, 1911, claiming "moneys paid by the plaintiff to the defendant on account of goods, wares and merchandise which said defendant agreed and promised to deliver to the plaintiff, but which the said defendant has failed to deliver, whereby said plaintiff is entitled to the return of the money so paid to the defendant".

The summons issued in this suit was returned not found. On the same day the suit was begun, however, an attachment in aid was sued out on the ground of the non-residence of the defendant and the Adams Express Company was garnished.

As the plaintiff's lawyer (and husband) had taken the precaution five days before to write to the defendant, whose residence was in New York, to send to Chicago by express to the plaintiff C. O. D. the goods which the plaintiff "had failed to deliver", and to advise by wire, so that he "might be ready to receive them", and as the defendant had immediately complied with the request, the garnishment was effective, as was shown by the answer of the Adams Express Company on January 18, 1912, in which it said that a package was delivered to it on November 18, 1911, by the defendant to carry to the plain-

tiff, and that its charges for carriage had been paid by the plaintiff's lawyer and husband, "who was accompanied by a bailiff of the Municipal Court, who opened said package and took a dress therefrom under a writ of replevin number 35348 in the Municipal Court." It also answered that the balance of the shipment remained in the hands of the garnishee.

April 29, 1912, the defendant filed an affidavit of defence, in which she said that she had not received from plaintiff any money on account of any goods she had failed to deliver, but that she had sold certain goods to the plaintiff, on which the plaintiff had paid $300 on account and promised to pay the balance, $700, on delivery of the said goods to plaintiff in Chicago; that she (the defendant) shipped said goods to Chicago by express to be paid for by plaintiff on delivery, and that said plaintiff failed and refused to pay for said goods, but in place thereof attached said goods in the hands of the Express Company.

The defendant likewise filed an affidavit of set-off, the substance of it being the following bill:

"Oct. 15 Black cloth suit and skirt, $90.00
Black and white net waist, 40.00
Blue satin charmeuse gown, 160.00
Silk Persian evening coat, lined velvet, 175.00
White satin charmeuse evening gown 160.00
Black char.satin embr. blk and gold wrap, 175.00
Blue and white check velvet frock with antique collar, 140.00
Remaking old Wisteria gown, new lining, chiffon and lace, 50.00

$990.00
Oct. 10 Deposit by check, 300.00
Balance $690.00."

The case was submitted to a jury on October 17, 1912, and the jury found for the plaintiff "as to the attachment and as to the merits of the action", and assessed the plaintiff's damages at $250.

On this verdict judgment was entered October 26, 1912, for $250 in favor of the plaintiff against the defendant and final judgment was also entered against the garnishee, ordering it to turn over the goods in its hands to the bailiff of the Municipal Court to be sold on a special execution to satisfy said judgment against defendant.

November 21, 1911, a writ of replevin for the "wisteria gown" had been sued out of the Municipal Court by the plaintiff, Nellie Loeb, and the gown taken as stated in the answer of the Express Company. The defendant in the suit at bar, Blanche Yovin, was made a defendant in that replevin suit jointly with the Adams Express Company. The Express Company made default, but Blanche Yovin answered, asserting a right of possession of said gown by virtue of a lien she had thereon for the sum of fifty dollars for work done and material furnished by her on said gown at the plaintiff's request. This case was tried before the Municipal Court without a jury and the finding and judgment were for the plaintiff, the same evidence being considered by the Court that the jury had before it in the case at bar.

We are unable to approve the judgment in either of these cases. The verdict in the case at bar seems to us opposed to the clear weight of the evidence. A new trial should have been granted on that ground.

The case seems to us the very simple one of a Chicago woman commorant in New York ordering some new dresses made and an old one made over by a New York dressmaker, and (being disappointed in the hope that they could be finished before she left New York) ordering them sent to Chicago C.O.D., and then in a fit of pique in having her perfectly good but uncertified cheque refused by the express messenger in payment, declining to take the goods at all, and demanding a return of

the favorite old gown which had been repaired, and of the money paid on account of the new ones, less the $50 which was to be paid for such repair. She succeeded in having her demands upheld by the jury and the Court below, but,it seems to us,in the teeth of the law and the facts.

The defendant in error says that it was a part of the bargain that she should have a portion at least of her order delivered while she was at the Plaza Hotel in New York, and that she was not bound to take goods sent C. O. D., because she had no opportunity for inspection.

These seem to us to be afterthoughts. The gowns were ordered in September or October, 1910. Mrs. Loeb left New York for Chicago early in November, 1910, as she says, after giving the dressmaker $300 on account, "a deposit" she herself calls it. The gowns, it was agreed, were to be sent on to Chicago by express. When they came a few days later in November, 1910, they came C. O. D. The express messenger, Mrs. Loeb says, came to her residence and the maid came up and brought the bill for $690. "I wrote out a check and I gave the maid the check and she went down stairs and was talking to the express man." * * * * * * * * * "I heard him say, 'We don't take checks' and I said, 'Come up, Anna, never mind. I am glad of it.'"

It would seem that in further correspondence early in 1911, Mrs. Loeb told the defendant to press the goods and send them again, when the balance should be paid, but that Mrs. Yovin held them in New York and notified plaintiff they were ready to be sent when the check should come. After that nothing happened until the "tour de force" by which the goods were invited to Chicago and attached in November, 1911.

This is the plaintiff's own version. She says nothing was said in New York about the goods being sent C.O.D.,

but the preponderance of the evidence is to the effect that it was expressly agreed in New York between plaintiff and defendant that the goods should be so sent. The letter of the husband and lawyer and agent of the plaintiff, dated November 16, 1911, was offered in evidence, but ruled out. We think it should have been admitted as a part of the transaction and explaining the conduct of the defendant in sending the goods here in November, 1911, C. O. D. for the second time.

We think the instruction ten complained of was plainly erroneous. Something must have been left out of it. It is senseless both as it appears in the abstract and the record.

The judgment is reversed and the cause remanded to the Municipal Court.

REVERSED AND REMANDED.

arch Term, 1913, No.
84 - 19075

1090

NELLIE LOEB,
Defendant in Error,

vs.

BLANCHE YOVIN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 219

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error in the replevin suit referred to in the opinion filed contemporaneously herewith in Loeb v. Yovin, No. 19076. The cause was tried by the Court below without a jury on the same evidence that was presented in 19076. The Court found for the plaintiff. We think that finding was against the weight of the evidence, which, in our opinion, sustained the right of the defendant to a lien on the gown replevied.

The judgment is reversed and the cause remanded to the Municipal Court.

REVERSED AND REMANDED.

March Term, 1913, No.
March Term 19240, No.

1093

IMPERIAL SAFE DEPOSIT COMPANY,
Appellant,

vs.

THE UNIVERSITY OF CHICAGO,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

187 I.A. 229

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for false representations alleged to have been made by the defendant to plaintiff in an exchange of real estate between them, upon the trial the court instructed the jury to find the defendant not guilty. From the judgment on this verdict plaintiff has appealed.

The plaintiff is a corporation, of which A. E. Nusbaum is president and Isaac Rubel secretary and treasurer; they own practically all the stock. In February, 1907, plaintiff owned improved real estate located at the corner of Jackson boulevard and Green street, Chicago, and wishing to dispose of it engaged the services for this purpose of C. S. Ennis & Co., real estate brokers. Ennis & Co. advertised the property, and in answer thereto received a call from George M. Bauman, a real estate broker, who had an office with the real estate firm of J. K. Van Vlissingen & Company, although not a member of the firm. Mr. Bauman died before this case was tried, hence his testimony is not before us.

In March Bauman submitted to Ennis a written statement apparently prepared in the office of Van Vlissingen & Co., purporting to give the income and expenses of what is called the Hankins apartment building, which belonged to the defendant, Bauman saying that the figures were obtained from the books of the defendant. There is no evidence that Bauman was then employed by the defendant or that anyone connected with it knew that he

was dealing with Ennis with reference to its property. Ennis transmitted this statement to Rusbaum and Rubel and afterwards went with Mr. Rubel and examined the Hankins property. On September 23, 1907, Ennis told Bauman that they would not proceed further with the matter unless Bauman should furnish a full, complete, detailed statement of the property, signed, and on that date he received from Bauman a statement of gross rents, disbursements, fixed charges and expenses, and net rents of the Hankins property. This statement was signed by Bauman, and with it was a letter of the same date to Ennis & Co., referring to the property and concluding thus:

"The items contained in the enclosed statements are known by the writer to be, in the main, correct.

The items for decorating and fuel are estimated, but it is believed that the figures shown will prove in excess of the requirements. The reason for being unable to furnish exact figures, we believe was explained to you some time ago.

In handing you the enclosed statements, it is with a view of complying, so far as we can with your request of even date.

Hoping to be of service to you, we are,

Yours very truly,

J. H. Van Vlissingen & Co.,

per Geo. M. Bauman."

Ennis referred this statement and letter to plaintiff, who replied by a letter dated September 24, 1907, to Ennis & Co., proposing an exchange of the properties upon certain terms and conditions, which letter contained a provision as follows:

"It is understood and agreed that the figures given in the statement of the rentals and expenses, dated September 23rd, 1907, signed by J. H. Van Vlissingen & Co. per Geo. M. Bauman are correct and that this proposition is based upon these figures being correct."

There is no evidence that anyone connected with the defendant had anything to do with preparing or authorizing any statements made prior to September 23rd, or the statement or letter of that date, and nothing was said verbally at any time by anyone connected with the defendant as to the correctness of anything contained in these statements.

Plaintiff's letter of September 24th was submitted to Wallace Heckman, the business manager and counsel for the defendant. Mr. Mnnis testified that he had two or three conferences with Heckman between September 23rd and the date of closing the deal in November, and that the accuracy or truthfulness of any of the statements was not discussed by them. On October 17th Mr. Heckman wrote a letter, the first part of which is as follows:

"Messs. J. H. Van Vlissingen & Co.,
and
Mr. George M. Bauman,
First National Bank Building, Chicago.
Gentlemen:-
In regard to the communication of the Imperial Safe Deposit Company to Callistus S. Mnnis & Co. of September 24th, submitted by you to me, I desire to say -
1 No representation has been made by this office to J. H. Van Vlissingen & Co. or to Mr. Bauman, with respect to the disbursements connected with the property mentioned in that communication, and that any negotiations must be upon the basis that no such representations have been made. Disbursements in connection with property of this character constitute both improvements and annual charges in which there might be a difference of opinion as to classification. If representations are made with respect to disbursements a purchaser will necessarily reach his own conclusions from his experience and not from statements submitted. In order that there shall never be ground of complaint in this particular against the university, our policy has been uniform in this regard and we are unwilling to depart from it in this instance. The rent roll the purchasers are at liberty to verify by an inspection of the leases."

The remainder of the letter concerns some of the terms and conditions of the exchange proposed in plaintiff's letter of September 24th, some of which were accepted, others modified or declined. We do not state them here, as in our opinion they are only slightly material to the main questions involved.

On October 19th plaintiff wrote a letter, which was given to Bauman to be delivered to Mr. Heckman, as follows:

"J. H. Van Vlissingen & Co.,
164 Dearborn St.,
Chicago.
Gentlemen:
Referring to the letter from Mr. Wallace Heckman to you dated 17th inst., submitting on behalf of the University of Chicago offer for premises N. E. corner Jackson Blvd. & Green St. would say that same is acceptable to us, provided

the University of Chicago loan to the undersigned Isaac F. Rubel, the sum of $135,000, with interest at 5½% per annum payable semi-annually to be secured by notes and mortgages or trust deed on the apartment buildings and to be payable $10,000 in two years and $125,000 in five years with privilege of pre-payment in sums of $5,000 or multiples thereof on 60 days prior notice in writing, or in the absence of such notice, then at any time upon payment as aforesaid of principal and accrued interest plus a bonus at 1%, and provided further that the University of Chicago pays us a cash difference on the deal of $10,000 and assumes the payment of the $200,000 encumbrance on our property.

IMPERIAL SAFE DEPOSIT CO.
Per A. E. NUSBAUM, President.
Per ISAAC F. RUBEL, Secretary."

In the early part of November, following, the exchange of the properties was made.

Plaintiff claims, and sought to show upon the trial, that the representations made on September 23rd as to the gross income from the Hawkins property were largely in excess of, and the gross annual expenses very much less than, the actual income and expenses, and that such representations were falsely made for the purpose of inducing plaintiff to make the exchange of properties, and that plaintiff believed and relied thereon.

We are of the opinion that the trial judge properly directed the jury to acquit the defendant, for at least two sufficient reasons. There is no evidence that Mr. Bauman had any authority to make the representations in question. We may agree with the statements of law presented by counsel for the plaintiff. Undoubtedly a case should not be taken from the jury where there is any evidence from which reasonable inferences favorable to the plaintiff may be drawn, but such inferences must be reasonable and not mere speculations produced by fervid appeals to the emotions or imagination. The most important bits of evidence touching the authority of Bauman to make the representations, are the fact that he made representations, followed by a letter from the defendant disclaiming any representations made by Bauman or by anyone, and stating that the deal if closed must be upon the basis that no representa-

tions had been made by the defendant, followed by a consummation of the transaction. We cannot agree with the contention that from the consummation of the negotiations we may be permitted to infer authority in Bauman to make the representations which he made. The undisputed evidence that the defendant took the position that it would not continue the negotiations except upon the basis that it would not be bound by any representations made concerning its property and that the plaintiff must rely on its own experience and judgment, precludes any such inference as claimed by counsel for plaintiff. To repeat all the detail appearing in evidence would be of no avail. Counsel for plaintiff referred to incidents which to them seemed suspicious, but we are referred to nothing tangible from which there can be deduced by any process of reasoning the fact of authority in Bauman to make the representations complained of. Accepting all the established facts favorable to plaintiff, the question of Bauman's authority became one of law, and the trial court correctly decided that his representations were neither authorized nor ratified by the defendant.

We are of the opinion that the court ruled properly on the motion to instruct the jury, for the further reason that it does not appear that the plaintiff relied upon the representations made by Bauman. This is shown from the facts before us. The brokers and the officers of plaintiff had been considering this exchange for some time before any offer was made by plaintiff. There were exchanged between them various statements of the income and expenses. There was also an examination of the Hawkins property made by Mr. Bubel and his broker, Mr. Innis, in the summer of 1907. It is evident from a consideration of the letter of Bauman of September 23rd, indicating that the figures given at that date were estimates and not exact, and the reply of plaintiff of September 24th, that plaintiff was ask-

ing as a condition to its proceeding with the negotiations that the defendant should vouch for the correctness of the figures contained in Hauman's statement and letter. Plaintiff was at this time calling upon the defendant for some guaranty as to the figures upon which plaintiff could place reliance; otherwise it would not continue negotiations. Nowhere do we find any such assurance given. On the contrary, as we have seen, Heckman's letter of October 17th repudiated any figures contained in the statement of September 23rd, or of any time, and the letter of plaintiff dated October 19th, which by its language purports to be in reply to Heckman's letter, tends to prove that this repudiation was known and acquiesced in by plaintiff. On the other hand, accepting the testimony of plaintiff's officers that at the time they wrote this letter of October 19th they had not seen Heckman's letter, which was in the possession of Hauman, it does appear that they knew of it and that they were told it was the reply to their proposition of September 24th; and if the officers of plaintiff chose to proceed without information as to whether the defendant would guarantee the figures of September 23rd, as had been demanded by them, they will be held to have waived such a guarantee and to have proceeded relying upon the representation of inexact estimates and their own judgment. In either view of the matter plaintiff failed to establish that they relied in making the exchange upon the representations alleged to have been made by the defendant. That an action cannot be maintained unless the plaintiff has relied upon the representation and acted upon it to his injury, has been held in many cases. Among such cases are Croker v. Hanley, 164 Ill. 388; Hitson v. Farwell, 132 Ill. 327; People v. Healy, 128 Ill. 9; Fauntleroy v. Wilcox, 80 Ill. 477.

Many other points are presented and discussed by

counsel, upon which we do not think it necessary to comment. The above are sufficient reasons for our conclusion that there was no error in the ruling of the court, and hence the judgment is affirmed.

AFFIRMED.

March Term, 1913, No.

328 - 19342

1095

ANNA PRZYBYLSKI,
Appellee,

vs.

INTERNATIONAL HARVESTER COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

187 I.A. 235

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, as the widow and beneficiary of Paul Przybylski, brought suit for benefits claimed by virtue of his membership in the Employes' Benefit Association of the defendant. She had judgment, from which defendant has appealed.

The statement of claim alleges that plaintiff's husband was a member of this association; that he died April 2, 1911, while a member; that the rules provided for payment to the widow of a sum equal to one year's average wages; that within the proper time a death claim for benefits was made to the superintendent of the association and to the board of trustees, which was refused.

The defense is that the deceased left the service and employment of the defendant on January 30, 1911, without notice and without any report of any sickness or disability; that under his contract of membership there was a termination of employment and of membership, and therefore neither he nor plaintiff was, after said termination, entitled to any benefits; that deceased did not at any time report sickness or disability, as required by the rules and regulations of the benefit association, and that he did not die as the result of any sickness or disability beginning and reported prior to the termination of employment and of

membership and continuing thereafter without interruption.

The benefit association is maintained by defendant to provide benefits for employe members in case of sickness, accident or death. It is not operated for the profit of the defendant, which contributes $5[illegible], [illegible] annually to its support. The employes also contribute to the benefit fund. One-half of the board of trustees are appointed by the defendant and the other trustees are elected by the employes.

Plaintiff's husband became a member of this association on September 16, 1908, the application which he signed being, in part, as follows:

> "I, Paul Przybylski * * * do hereby apply for membership in said Employes' Benefit Association, and agree to be bound by the regulations of said Benefit Association, a copy of which has been by me received, and by any other regulations of said Benefit Association hereafter adopted and in force during my membership. * * *
>
> "I also agree that * * * my resigning from or leaving the service of said International Harvester Company * * * or my being relieved or discharged therefrom, shall forfeit my membership in said Benefit Association, and all rights, benefits and equities arising therefrom, except that such termination of employment shall not (in the absence of any of the foregoing clauses of forfeiture) deprive me of benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption, to and after such termination of employment; nor of the right to continue my membership in respect of death benefits only as provided in said rules."

The rules of the association in force at the time, so far as pertinent to the question in this case, are as follows:

> "15. Leaving Service.- When a member resigns from the service or leaves the service without notice, or absents himself without notice, (unless he afterwards gives reasons satisfactory to the Superintendent), or is discharged or is laid off for a period longer than 90 days his membership in the Association shall terminate with his employment and he shall not thereafter be entitled to any benefits except for disability beginning and reported before such termination of employment and continuing without interruption.

"Any employe leaving the service who has been a member of the Benefit Association for one year, or who was a member of the Association January 1, 1909, and has been in the service five years, may continue his membership in respect only of the minimum death benefit which he has held during the last year of employment, or of any smaller amount upon making supplementary application therefor before termination of employment or within five days thereafter.

"41. Disability.- Wherever the word 'disability' is used in these regulations, it shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work.

"42. The decision as to when members are disabled and when they are able to work shall rest with the Medical Examiner of the Association and his decision shall be final and binding upon the member, subject to the provisions of the regulations.

"43. Notification.- When a Works member becomes disabled he shall notify his timekeeper immediately, or cause him to be notified; other employes shall notify their superior officers. In reporting disability, member shall give his house address. * * *

"44. Reports.- When a member becomes disabled he shall also, unless unable on account of his disability, report immediately to the Medical Examiner at his office, during business hours. A disabled member not confined to the house by his disability, shall also report at the Medical Examiner's office from time to time as requested and keep any other appointments made by the examiner. Members who avoid the medical examiner or neglect to report, or keep appointments, shall not be entitled to benefits."

The contract of membership consisted of the application for membership, the certificate of membership and the rules and regulations of the association. Benes v. Knights and Ladies of Honor, 231 Ill. 134. It is not disputed that plaintiff cannot recover if the conditions precedent in the contract of membership have not been complied with (appellee's brief, page 10).

Referring, then, to the terms of the application, it is clearly stated that membership in the association shall cease upon the termination of employment with the defendant company, but that such termination shall not deprive the member of any benefits to which he may be entitled by reason of

disability beginning and reported before and continuing without interruption to and after such termination of employment, nor of the right to continue membership in respect of death benefits only as provided in said rules. This right to death benefits, last referred to, appears in the latter part of Rule 15, above quoted, where it is provided that a member who has been in the service five years, even though he should leave the service, may continue his membership under certain conditions. It is not claimed that deceased comes within this provision.

As plaintiff in this court has abandoned all claims for wages and for disability benefits, and seeks only death benefits, we shall confine our consideration to this point. Rule 15, supra, repeats substantially the provisions in the application concerning the effect of termination of employment with the defendant. The language is clear and unambiguous. It states that when a member resigns from the service or leaves or absents himself without notice (unless he afterwards gives reasons satisfactory to the superintendent), or is discharged, his membership in the association shall terminate and he shall not thereafter be entitled to any benefits, except for certain disability benefits which plaintiff is not claiming. It therefore is manifest that if plaintiff, because of any of the conditions named in the application or in Rule 15, was not employed by the defendant company at the time of his death, his membership in the association was forfeited and he was not entitled to any death benefits.

The facts relating to deceased's employment with the defendant are as follows: Krzybylski was absent from work from January 22nd to January 26, 1911, inclusive. On the latter date he returned and asked the foreman if he could go back to work. His foreman asked him why he had been away,

and was told that he had been away on business, buying a saloon. He tried to arrange his work so that he could arrive late in the morning, after helping his wife with the saloon, and told the foreman that he was not going to start work at the regular time. The foreman told him that he could return to work but that he would have to start at the regular time. He appeared for work on January 27th, 28th and 30th, but usually two to four hours late. On January 31st he did not appear at all, and the foreman gave instructions to drop Przybylski from the payroll, which was done, and a notice, called "termination of service notice," was sent to the superintendent of the benefit association, effective January 31, 1911. Przybylski did not at any time subsequent to January 30, 1911, report for work or give any reasons to his superintendent for his absence. It is not claimed that any notice, report or information of any sickness or disability of Przybylski was given to defendant before January 31, 1911, and no notice or report or information of any kind as to his health was given to the timekeeper or medical examiner or anyone officially connected with the association at any time. He beyond doubt left the service and absented himself without notice, and under the provisions of Rule 15 his membership in the association terminated on January 31, 1911.

Counsel for plaintiff seek to avoid the obvious effect of Rule 15, by arguing that it must be shown that the leaving or absenting himself from service was "absolutely voluntary," that is, if we understand rightly, not induced through any sickness from which deceased might be suffering. This contention is met by the provision in Rule 15, that under such circumstances an employe may afterwards give reasons satisfactory to the superintendent for leaving or

absenting himself without notice. No attempt to give such reasons was made in this case.

We see no way to avoid the conclusion that under the undisputed facts and the operation of the provisions of the contract of membership plaintiff is not entitled to recover, and the judgment is reversed without remanding the cause.

REVERSED.

328 - 19342

FINDING OF FACT.

The court finds that plaintiff's husband, Paul Przybylski, at the time of his death was not in the employ of the defendant, International Harvester Company, and that under his contract of membership in the Employes' Benefit Association he had forfeited his membership in said Benefit Association and all his right to any death benefits.

March Term, 1913, No.
343 - 19357

187 I.A. 238

CHICAGO TITLE & TRUST COMPANY, Trustee,
Complainant-Appellee,

vs.

WILLIAM G. EDENS et al. (Defendants),

On appeal of
EDWARD ROBY,
Appellant.

Appeal from Circuit Court, Cook County.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Edward Roby from a decree entered in a chancery proceeding brought to foreclose a trust deed. The bill was filed by the Chicago Title & Trust Company as trustee and in its own right, against William G. Edens and his wife, Lillian Maud Edens, and the appellant, Edward Roby, praying for foreclosure of a trust deed executed by Edens and wife to said company to secure a loan made by it to Roby and evidenced by Roby's notes of even date with the trust deed. Edens and his wife were served with summons, and Mr. Edens' appearance and answer were filed by Mr. Roby as his solicitor. Mr. Roby also filed his own appearance and answer, and to each of the answers complainant filed a general replication. An order of default was entered against Mrs. Edens and the cause referred to a master in chancery to take evidence on the issues joined and to report the same to the court with his conclusions. Subsequently the master filed his report, finding the material allegations of the bill to be true and recommending that its prayer be granted, and afterwards an order was entered approving and confirming the report, and a decree of sale was entered, from which Mr. Roby alone has appealed.

Many points are urged by appellant as grounds for a reveraal of the decree, and to discuss all of them would extend this opinion to an unreasonable length. We shall endeavor, however, to

touch upon those points which we understand are principally relied upon.

It is urged that the decree should be reversed because of appellee's failure to prove the allegation of its bill to the effect that it had no other security than the lien of the trust deed in question, and the allegation that it had not commenced any suit at law for the recovery of the moneys due it. We do not think these allegations were material as bearing on appellee's right to a decree, and as to the second allegation, the law gave to appellee the right, if it desired, to sue at law concurrently with the pendency of the suit in equity to foreclose, with the limitation, however, that there should be but one satisfaction. If there was any error in failing to make proof of these allegations it was entirely harmless.

It is also urged that there was a failure of proof that Edens was the owner of the lands conveyed by the trust deed and that appellant was denied the right to prove that certain of the lands were held adversely by the South Chicago & Southern Railroad Company under a deed dated in May, 1886. These points may be answered by the following considerations:

(1) It is well settled that a mortgagor will not be permitted to deny his own title. All that appellee sought to subject to the payment of the mortgage debt in this proceeding was whatever title Edens, the grantor, had. Racine & M. R. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331.

(2) Both Edens and Roby expressly stipulated that all of the real estate coveyed by said trust deed and not released was "subject to the lien of said trust deed." It also might be noted that in Mr. Roby's objections to the master's report he describes the premises in question as "owned and mortgaged by William G. Edens."

(3) We do not see how the failure to establish the fact of such ownership could injure Roby, who was liable as a principal

upon the notes, whether Edens' title to the land fails either in whole or in part.

Touching the second point above raised by appellant, certain exhibits were offered in evidence by the defendants for the purpose of showing that certain portions of sundry lots described in the trust deed were held adversely by the South Chicago & Southern Railroad Company. These offers were excluded by the master. This adverse title of the Railroad Company is alleged to have originated under a deed recorded in May, 1886, which was over twenty-four years prior to the execution of the trust deed in question, made by an entire stranger to Edens, and the occupation of this strip of land adversely to Edens is alleged to have continued during all that period. If this is true the validity of this independent adverse claim could not properly be tried in this foreclosure suit, in which the only proper parties were the mortgagor and mortgagee and those who might have acquired rights under them subject to the mortgage. Gage v. Perry, 93 Ill. 176; Bozarth v. Landers, 113 Ill. 181; O'Connell v. O'Conor, 191 Ill. 215; Ennis v. Wolff, 194 Ill. 420. The suggestion that if the adverse title claimed by the Railroad Company is not litigated and settled in this suit the court could not deliver possession of the part of the premises occupied by the Railroad Company to the purchaser under the foreclosure, and therefore would have to vacate the sale and cause the money to be refunded, is without weight. The rule of caveat emptor applies to foreclosure sales, and defects in title are not grounds for rescinding the sale or for reimbursing the purchaser at the sale. Louisville & N. R. R. Co. v. I. C. R. R. Co. 174 Ill. 448; Bishop v. O'Conner, 69 Ill. 431.

Another point urged is that it was error to decree "that part of the lands under the lien should be sold, and that if they failed to bring enough to satisfy the amount found due, that the master should make a report of deficiency." We understand this to re-

fer to the language describing the premises conveyed in the trust deed. This language, which is too long for quotation, in substance undertakes to convey all of certain lots which were acquired by the receiver in a certain chancery proceeding and which were not,prior to the date of the trust deed,conveyed under order of court, "and especially the following described lots and parts of lots and land situate in said City of Chicago, County of Cook and State of Illinois, that is to say"; then follows a specific description by lot and block number of some 300 lots in various blocks in South Chicago. The decree contained no reference to that part of the general description with reference to the lots conveyed to the receiver in the prior chancery cause, but ordered to be sold only the lots specifically described by lot and block number. Appellant's point apparently is that there may have been property included in this general description which is not embraced in the list of property specifically described in the decree and directed by it to be sold, and that for this reason the decree orders the sale of only part of the mortgaged lands, and that this may result in a deficiency greater than would arise if all the lands were sold, thus resulting in injury to appellant.

We think this contention may be answered by saying, first, that Mr. Roby's obligation to pay the indebtedness is that of a principal, and Edens and the land conveyed occupy the position solely of surety, and that the surety may be released in whole or in part by the owner of the debt without in anywise discharging the principal. Price v. Dime Savings Bank, 124 Ill. 317. Second, it is claimed by appellee that as a matter of fact there was no property embraced within the terms of the general description which was not included in the property specifically described in the decree, and the record supports this claim. However, Edens is not complaining of this decree, and it was held in Coffeen v. Thomas,65 Ill. App. 117, that in a foreclosure proceeding no

ground of complaint arises to the mortgagor if the mortgagee , purposely or by inadvertence, omits from the decree of sale a part of the land mortgaged,thereby in effect releasing such part, Third, we think it is also clear that the papers offered by Mr. Roby were inadmissible, in the absence of a further offer to show in connection with them what portion of the lands conveyed to the receiver had not been "prior to the 15th day of July, 1910, conveyed under and pursuant to orders of said court" by it. It cannot be determined what property the receiver held on July 15th, 1910, unless in addition to showing what lands were conveyed to the receiver it was also shown what lands were conveyed by the receiver under order of court prior to July 15th, 1910. It might further be said that the decree makes no finding of any personal liability, but the master is simply directed to report any deficiency which may exist after the sale, and that it is not now possible to say whether or not there will be any deficiency.

Complaint is made that the master's fees were excessive, but considering the time occupied and the work necessary in examining exhibits, making findings, computing the amount due, drawing the report, and other services, we are of the opinion that the master's fees are reasonable.

As to the contention that it was unnecessary for the master to take evidence as to those things admitted by the answers and which were therefore not in issue, it is sufficient to say that there was a default against Mrs. Edens and that it was therefore incumbent upon the complainant to prove all the material allegations of the bill, and in addition to this an examination of the answers of Edens and Roby discloses that there still remained a large number of material allegations in the bill which complainant was called upon to prove.

Appellant further contends that under the first part of section 20 of the Fees and Salaries Act, chapter 53 Illinois Statutes, masters' fees for examining questions of law and fact

and reporting conclusions are limited to $10.00, and that this renders nugatory the latter part of this section, which provides in effect that in Cook County masters may receive for these services "such compensation as the court may deem just." Schnadt v. Davis, 185 Ill. 476, is authority for holding that the concluding portion of this section, relating to fees of masters in Cook County, "changes" the provisions of the preceding portions of the section. We cannot undertake to pass upon the constitutionality of the latter part of this section. If the constitutionality of this section is involved the appeal should have been direct to the Supreme Court. Furthermore it appears that a statement of the amount claimed by the master for his fees was attached to the master's report filed in the Circuit Court. Appellant in no way challenged the correctness of that statement in the court below, and he has not assigned as error in this court the allowance of said fees. It is too late to raise this point for the first time in this court. Freese v. Glos, 248 Ill. 380.

We cannot agree with the contention that appellant should have been permitted to offer oral testimony when the case was heard by the chancellor. The matter before the chancellor was upon the exceptions to the master's report, and in Cox v. Pierce, 120 Ill. 556, it was held that the testimony taken by the master and reported to the court was "testimony taken on the trial," and that the trial court was right in its refusal to hear further evidence upon the hearing of exceptions to the master's report. To the same effect is Prince v. Cutler, 69 Ill. 267.

It is strongly urged that the master had no power to pass upon the competency of evidence. Rule 2 of the Circuit Court expressly gives to masters the power "to pass on all questions of competency of witnesses and the propriety and relevancy of all questions or interrogatories put by counsel * * * and in case the master shall hold that any question is irrelevant or incompetent

the same shall not be answered." It is provided in section 2 of the Chancery Act and in section 62 of the Courts Act, Revised Statutes of Illinois, chapter 37, that the court has power to make such rules, and we see no reason, even in the absence of statute, why the courts would not have inherent power to adopt suitable rules for the regulation of practice in actions pending before them. As to the point that the rules were not sufficiently proven, we think the testimony of the witness Bell, deputy clerk of the Circuit Court, was sufficient for this purpose, and we have always understood the rule to be that the court would judicially take notice of its own records. In Elwood v. Walter, 103 Ill. App. 219, a foreclosure case, the court in its opinion discusses at some length the power of a master in chancery to rule upon testimony, and concludes, "both upon principle and authority, that upon a reference to take and report proofs with conclusions of law and fact, the master has authority to rule upon objections to the testimony offered." In Dickinson v. Torrey, 91 Ill. App. 297, the court stated that the proper practice required counsel seeking to introduce evidence before a master to which objections had been sustained, to apply to the court for a ruling on the admissibility of this evidence before the master has made his report.

We do not agree with appellant's contention that complainant by replying to the answers took issue on all the averments of the answers irrespective of their materiality or responsiveness to the bill, thus leaving the defendants free to prove everything alleged in their answers. We do not understand that a general replication puts at issue anything more than the material allegations of an answer.

On a review of the entire case we are convinced that the decree was right and that minor errors, if any there be, should not work a reversal. Mr. Roby does not contend that the debt is not due and owing to the complainant. There is no complaint made

that the amount found by the decree to be due and unpaid is too large, or that it is unjust, or that there is any reason why it should not be paid. Mr. Roby has no interest in the real estate sought to be foreclosed, as it belongs to Edens, and Edens apparently is satisfied with the decree and is not appealing therefrom. It has been said that no one can assign for error that which does not affect him, but is supposed to be prejudicial only to others who do not complain. Press v. Woodley, 160 Ill. 433; Ransom v. Henderson, 114 Ill. 528.

Concluding as we do, that there is no merit in any of the points raised by appellant and that there is no substantial error in the decree entered by the court, the decree is affirmed.

AFFIRMED.

March Term, 1913, No.
370 - 19397

STANLEY EDWARD JOHNSON, by Andrew Johnson, his next friend,
Appellant,

vs.

HENRY DEKKER,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

187 I.A. 240

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered on a directed verdict for the defendant in a suit for damages for personal injuries.

The declaration alleges negligence in the manner in which defendant loaded and piled bags of grain on his wagon, and in the manner of driving the wagon so loaded on the highway, so that a number of the bags fell off the wagon and on plaintiff, a minor, then lawfully on the street.

It was in evidence that plaintiff, a lad of six years, and another boy were going to a store to buy candy; that they walked behind the wagon belonging to defendant and for a time had hold of a chain hanging from the tailboard. When they came to the cross-walk of an intersecting street they let go of the chain, and plaintiff started for the store, walking on the cross-walk, when several bags of grain fell from the rear of the wagon upon him.

If these are the facts, the cases which we are told moved the trial court to direct a verdict are not in point, as in those cases the injured child was "hitching on" to the vehicle at the time of the accident. There is evidence here that plaintiff was on the street, where he had a right to be, when the bags fell. We think the jury should have been permitted to pass upon the matter without the peremptory instruction.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

tober Term, 1913. No.
41 - 19420

1097

ATLAS FLOOR COMPANY, a corporation,
Defendant in Error,

vs.

ROBERT J. McLAUGHLIN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 241

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and had judgment for labor and materials furnished in laying two floors in shops belonging to the defendant. Defendant claims the floors were to be according to sample and that they were inferior to sample.

We think the trial court was justified from the evidence in finding there was no warranty, express or implied, that the floors were to correspond to any sample, and that the defendant ordered them upon the advice of his architect and after his own independent investigation.

Most of the testimony on the trial concerns the condition of the floors, and after giving it consideration we see no reason to disagree with the conclusion that defendant had no just ground of complaint.

The judgment is affirmed.

AFFIRMED.

MR. JUSTICE McGURREN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and had judgment for labor and materials furnished in laying two floors in stops belonging to the defendant. Defendant claims the floors were to be scouring to sample and that they were inferior to sample.

We think the trial court was justified from the evidence in finding there was no warranty, express or implied, that the floors were to correspond to any sample, and that the defendant, having seen them upon the advice of his architect and after full and independent investigation.

Most of the testimony on the trial concerns the condition of the floors, and after giving it consideration we see no reason to disagree with the conclusion that defendant had no just ground of complaint.

The judgment is affirmed.

41 - 19420

ATLAS FLOOR COMPANY, a corporation, Defendant in Error, vs. ROBERT J. McLAUGHLIN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and had judgment for labor and materials furnished in laying two floors in shops belonging to the defendant. Defendant claims the floors were to be according to sample and that they were inferior to sample.

We think the trial court was justified from the evidence in finding there was no warranty, express or implied, that the floors were to correspond to any sample, and that the defendant ordered them upon the advice of his architect and after his own independent investigation.

Most of the testimony on the trial concerns the condition of the floors, and after giving it consideration we see no reason to disagree with the conclusion that defendant had no just ground of complaint.

The judgment is affirmed.

AFFIRMED.

41 - 19420

ATLAS FLOOR COMPANY, a corporation, Defendant in Error, vs. ROBERT J. McLAUGHLIN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and had judgment for labor and materials furnished in laying two floors in shops belonging to the defendant. Defendant claims the floors were to be according to sample and that they were inferior to sample.

We think the trial court was justified from the evidence in finding there was no warranty, express or implied, that the floors were to correspond to any sample, and that the defendant ordered them upon the advice of his architect and after his own independent investigation.

Most of the testimony on the trial concerns the condition of the floors, and after giving it consideration we see no reason to disagree with the conclusion that defendant had no just ground of complaint.

The judgment is affirmed.

AFFIRMED.

October Term, 1913. No.
51 - 19431

1099

S. F. SVENSON,
Defendant in Error,

vs.

H. J. LE BRUN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 242

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

We are told by the brief of plaintiff in error that there was a judgment entered against him "for an alleged unpaid balance on a painting contract," and that the trial court did not decide the case on the weight of the evidence. It is then stated that it is a familiar rule that a plaintiff must make out his case by a preponderance of the evidence, and many cases are cited, and then the brief ends.

The abstract tells us that in the case were a "statement and affidavit of claim" and an "affidavit of merits," but wherein plaintiff and defendant differed we are not thereby informed.

We gather, however, from the stenographic report that plaintiff did some painting under a contract on a flat building owned by the defendant and that defendant claims the work was not properly done. In a case of this kind we must rely largely on the judgment of the trial court, with his better opportunities for determining the credibility of the witnesses and the weight to be given their testimony. The court was of the opinion that plaintiff substantially performed his contract and there is no manifest reason for us to disagree with his conclusion. The judgment is affirmed.

AFFIRMED.

[illegible]

[illegible]

[illegible]

October Term, 1913. No.
151 - 19540

1101

MARY DRIMMEL, a minor, by Anton Drimmel, her father and next friend,
Defendant in Error,

vs.

RUDOLPH JAHRLING, impleaded etc.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 244

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit to obtain damages for injuries to Mary Drimmel, a minor, said to have been caused by a bite by a dog belonging to defendants. The case was tried by the court, who found for the plaintiff.

There is no evidence whatever in the record tending to show that Mrs. Rudolph Jahrling owned the dog or was responsible in any way for its conduct, so that even if Rudolph Jahrling, her husband, should be liable, his wife was not, and the judgment being erroneous as to one is erroneous as to both. Seymour v. Richardson Fueling Co., 205 Ill. 77.

There is no direct evidence that the child was bitten by the dog. At the time of the occurrence she was about four years of age, and while in Rudolph Jahrling's store she was heard to scream and was found lying on the floor with blood flowing from a jagged wound on the face. A dog said to belong to Jahrling was seen running around the counter. The doctor who treated the child for the injury testified that the wound was inflicted by something tearing and that it might have been made by the tooth or the claw of a dog. In the recent case of Domm v. Hollenbeck, 259 Ill. 385, the court said: "The natural presumption from the habits of dogs is that they are tame, docile and harmless, both as to persons and property, and the owner of a dog is not liable for damages resulting from the vicious or mischievous acts of the animal unless he had knowledge of his mis-

, a minor, by Anton
, her Father and next Friend,
Defendant in Error.

vs.

, Registrar etc.,
Plaintiff in Error.

ERROR TO MONTGOMERY
COUNTY OF CHANCERY.

Mr. Justice [illegible] delivered the opinion of the COURT.

This is a suit to obtain damages for injuries to
[illegible], a minor, said to have been caused by a bite by
a dog belonging to defendants. The case was tried by the
court, and found for the plaintiff.

There is no evidence whatever in the record sanc-
tioning, nor [illegible] the finding and judgment being erroneous in any way. In order, therefore, to make it responsible for [illegible], should be fixed, the suit and not, and the judgment being erroneous in the case of [illegible]
[illegible] Dowman v. Richardson Printing Co., 249 Ill. 47.

The record [illegible] by the [illegible]. As the case or the record on the [illegible] four years of age, and while in Anderson's store the [illegible] was heard to scream and was found lying on the floor with blood [illegible] from a [illegible] wound on the face. A [illegible] testified the dog [illegible] through the counter. [illegible] [illegible] inflicted [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] presumption from the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

chievous or vicious propensities, and such knowledge must be proved. (1 Thompson on Negligence, sec. 881.)" There is no proof before us that the dog was vicious or prone to bite mankind, and hence no knowledge by the owner, of such a disposition could be proved. Only one witness attempted to supply this evidence, but his opinion was based on something he had heard. Many witnesses testified that the dog was gentle and would play with children without attempting to bite them.

There being no evidence which would support the finding and judgment of the trial court, the judgment will be reversed without remanding the cause.

REVERSED.

FINDING OF FACT.

We find that the dog in question was not a vicious dog and that he was not accustomed to attack and bite mankind, and that defendants had no knowledge that he was a vicious dog and would attack and bite mankind, as charged in the statement of claim herein.

We find that the dog in question was not a vicious dog and that defendants had no knowledge that he was a vicious dog and would attack and bite mankind, as charged in the statement of claim herein.

1102

October Term, 1913.

171 - 19560

MARTIN E. TROUTMAN,
Defendant in Error,

vs.

POSTAL TELEGRAPH-CABLE COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 245

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Troutman, claims to have sustained damages by reason of the failure of defendant to deliver to the addressees a telegram given to it to be transmitted. Upon trial by the court he had judgment for $101.10, which was for his railroad fare from Meadville, Pennsylvania, to Chicago and return, amounting to $21.10, and $80 for loss of profits and commissions while absent from Meadville.

Plaintiff was an insurance solicitor and was employed on a commission basis by the Traveler's Insurance Company. He had in his employ George A. Wilson and Deaton J. Brooks, who were engaged by him as solicitors of insurance, the plaintiff receiving commissions on all policies written by himself and his employees. Wilson and Brooks had become dissatisfied and were contemplating a change of employment. At this time George S. Penfield, the manager of the company and plaintiff's official superior, was in Hartford, Connecticut, while plaintiff was in Meadville. Plaintiff had informed Penfield that Wilson and Brooks wanted a larger share of commissions, and Penfield wired plaintiff as follows:

"Wire Brooks and Wilson not to make a change until after hearing from me."

Pursuant to this instruction plaintiff sent the following telegram

to Chicago through the defendant:

"Meadville, Pa., Jan. 20, 1913.

To Wilson and Brooks
306 Ins. Exchange Chicago Ill.

Have wire from Panfield Make no arrangements for change until you hear from him.

Troutman."

This message was received in the Chicago office of the defendant and given to a messenger boy to deliver, but for some reason, which is not exactly clear, Messrs. Wilson and Brooks did not receive it. These men left the employ of the Traveler's Insurance Company, and this fact becoming known to plaintiff at Meadville he came to Chicago. It does not appear just why he came to Chicago or what he did after his arrival. As indicated above, he was allowed as damages his railroad fare for this trip and his loss of profits caused by his absence from Meadville.

This judgment must be reversed because there is no evidence that the failure to deliver the telegram had any bearing on the actions of Wilson and Brooks. There is no evidence whatever tending to show what either of these men would have done had he received the telegram. They were called as witnesses but no attempt was made to show that they would have changed their plans in any particular had the telegram reached them promptly. The effect that would have been produced upon their minds if they had received the telegram is merely speculative. It follows therefore that it cannot be said that the failure to deliver the telegram made it necessary for the plaintiff to take the trip to Chicago. Indeed it is a fair inference from the language of the telegram that if Wilson and Brooks had received the telegram promptly plaintiff would have made the trip to Chicago for consultation with them. We cannot permit the presumption that the trip was necessary because of the failure to deliver the telegram, to rest upon the presumption that if Wilson and Brooks had received it they would not have

So Cuts to through the defendant:

"Weedville, Pa., Jan. 20, 1913.

To Wilson and Brooks
308 Ins. Exchange Chicago Ill.

Have wire from Penfield Make no arrangements for change until you hear from him.

Trueman."

The message was received in the Chicago office of the detectives and given to a messenger boy to deliver, but for some reason, which is not clearly clear, Messrs. Wilson and Brooks did not receive it. These men left the employ of the Traveler's Insurance Company, and this fact becoming known to plaintiff at Weedville he came to Chicago. It does not appear just why he came to Chicago or what he did after his arrival. As indicated above, he was allowed to change his railroad late for this trip and his loss of profits caused by his absence from Weedville.

This judgment must be reversed because there is no evidence that the failure to deliver the telegram had any bearing on the actions of Wilson and Brooks. There is no evidence whatever tending to show what either of these men would have done had he received the telegram. They were called as witnesses but no attempt was made to show that they would have changed their plans in any particular had the telegram reached them promptly. The effect that would have been produced upon their minds if they had received the telegram is merely speculative. It follows therefore that it cannot be said that the failure to deliver the telegram made it necessary for the plaintiff to take the trip to Chicago. Indeed it is a fair inference from the language of the telegram that if Wilson and Brooks had received the telegram promptly plaintiff would have made the trip to Chicago for consultation with them. We cannot permit the presumption that the trip was necessary because of the failure to deliver the telegram, to rest upon the presumption that if Wilson and Brooks had received it they would not have

made the change in their employment which they did make.

The judgment is reversed without remanding the cause.

REVERSED.

October Term, 1913. No. 233 - 19625

1105

JOHN W. BARNES,
Defendant in Error,

vs.

SLEPH, SANDROWITZ & GOLDBLATT COMPANY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 253

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

A horse belonging to plaintiff was struck by a team drawing a heavily loaded wagon said to belong to defendant, Sleph, Sandrowitz & Goldblatt Company. The horse died and plaintiff sued to recover damages and had judgment.

Defendant claims (1) that there is not sufficient evidence that the horse died as a result of the injuries received in the accident; (2) that it does not sufficiently appear that the defendant owned the team and wagon inflicting the injuries; and (3) that negligence of defendant was not proven.

We do not agree with any of these contentions. The evidence shows that the horse of plaintiff, a small animal, was knocked down and a wheel of defendant's wagon, loaded with metal junk, ran over it. Plaintiff's horse was then taken to a hospital for treatment but died shortly thereafter. Before the accident it had been in good physical condition. This was sufficient to justify a finding that the injury caused the death.

There was sufficient evidence that defendant owned the offending team and wagon. The foreman of the yard in which the accident happened gave positive testimony on this point. The negligence was shown by the evidence that plaintiff's horse, hitched to a wagon, was standing still behind another wagon, and that defendant's team was driven past the front wagon and into plaintiff's horse and wagon with the result above described.

There is no reason for reversing the judgment and it is affirmed.

AFFIRMED.

)
Defendant in Error,)
) Error to
) Municipal Court
) of Chicago.
vs.)
)
)
)
Plaintiff in Error.)

MR. JUSTICE MOSUNELY DELIVERED THE OPINION OF THE COURT.

A horse belonging to plaintiff was struck by a team driven by a heavily loaded wagon said to belong to defendant, Black, Beardsley & Goldblatt Company. The horse died and plaintiff sued to recover damages and had judgment.

Defendant claims (1) that there is not sufficient evidence that the horse died as a result of the injuries received in the accident; (2) that it does not sufficiently appear that the defendant owned the team and wagon inflicting the injuries; and (3) that negligence of defendant was not proven.

We do not agree with any of these contentions. The evidence shows that the horse of plaintiff, a small animal, was knocked down and a wheel of defendant's wagon, loaded with wood, ran over it. Plaintiff's horse was then taken to a hospital for treatment but died shortly thereafter. Before the accident it had been in good physical condition. This was sufficient to justify a finding that the injury caused the death.

There was sufficient evidence that defendant owned the offending team and wagon. The foreman of the year in which the accident happened gave positive testimony on this point. The negligence was shown by the evidence that plaintiff's horse, hitched to a wagon, was standing still behind another wagon, and that defendant's team was driven past the front wagon and into plaintiff's horse and wagon with the result above mentioned.

There is no reason for reversing the judgment and it

October Term, 1913. No.

283 - 19680

B. SCHWINGER & CO., a corporation,
Defendant in Error,

vs.

GEORGE REDMAN, Trading as G. Redman & Co.,
Plaintiff in Error.

Error to Municipal Court of Chicago.

187 I.A. 254

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The only point made by plaintiff in error is that the trial court erred in refusing to strike certain depositions from the record and in permitting such depositions to be read to the jury. The objection to the depositions is that they were not accompanied by a certificate of the official character of the notary, as required by section 30 of the statute on "Depositions." 9 Ill. App. 547. The depositions in question were taken under a stipulation which provided that they could be taken before "Albert Edward Maves, a Notary Public in and for the County and State of New York (or before any other person in said county and state qualified by the laws of Illinois." It was further agreed that said depositions might be read on the trial of the cause "free from objections, based upon the form or method of said notary's, officer's or commissioner's return on, or of, said depositions, except the certificate of magistracy." Depositions were taken before the notary public named in the stipulation who signs as a notary public and affixes his notarial seal.

The point made by the plaintiff in error is directly answered by the decision in the recent case of Tompkins v. Tompkins, 257 Ill. 557, in which the court in its opinion says: "Where a commission is directed to a person by name to take a deposition he derives his authority from the appointment, which carries with it

GEORGE RUDMAN, Trading as C. Redman & Co.,

Plaintiff in Error,

vs.

Defendant in Error,

Error to Municipal Court of Chicago.

MR. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

The only point made by plaintiff in error is that the trial court erred in refusing to strike certain depositions from the records and in permitting such depositions to be read to the jury. The objection to the depositions is that they were not accompanied by a certificate of the official character of the notary, as required by section 30 of the statute on "Depositions." The depositions in question were taken under a stipulation which provided that they could be taken before "Albert Ilmers Mayer, a Notary Public in and for the County and State of New York (or before any other person in said county and state qualified to take depositions in the State of Illinois." It was further agreed that said depositions might be read on the trial of the cause "free from objections, taken upon the form or method of said notary's, officer's or commissioner's return on, or of, said depositions, except the certificate of magistracy." Depositions were taken before the notary public named in the stipulation who signs as a notary public and affixes his notarial seal.

The point made by the plaintiff in error is directly answered by the decision in the recent case of Tompkins v. Tompkins, 327 Ill. 327, in which the court in its opinion says: "Where a commission is directed to a person by name it is a deposition he derives his authority from the appointment, which carries with it

all the powers necessary to execute the commission, including the power to administer oaths to witnesses, and his official capacity is immaterial." We are of the opinion that the provision in the stipulation that the depositions may be read free from objections, "except the certificate of magistracy," means that should the depositions be taken before any other person, qualified by the laws of Illinois, than the particular person named in the stipulation, the certificate of magistracy should be affixed.

We are also of the opinion that this objection was not made in apt time. The depositions were taken January 3, 1913, and filed in the Municipal Court on January 20, 1913, and remained on file until the trial, which was on May 8, 1913, when, after the jury had been sworn to try the issues, defendant for the first time made the objection above referred to. It has repeatedly been held that it is too late to object on the trial to mere matters of form in depositions. Winslow v. Newlan, 45 Ill. 145.

The trial court properly ruled upon the motion to strike the depositions, and they were competent to be read to the jury. The judgment is affirmed.

AFFIRMED.

297 - 19695

October Term, 1915.

JULIUS ACHTERBERCH,
Defendant in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

187 I.A. 256

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff to recover damages for injuries to property and person sustained by him through a collision between a street car of the defendant and the wagon and horse of the plaintiff. The jury returned a verdict favorable to the plaintiff, and judgment thereon was entered, which defendant seeks to have reversed.

The only questions for our determination are of fact. Was the defendant guilty of negligence causing the accident in question, and was the plaintiff guilty of contributory negligence? Plaintiff's testimony tended to prove that on the morning of the accident he was driving a blind horse, hitched to an express wagon, on 51st street in an easterly direction; that he started in the eastbound or southerly car track about four blocks west of where the accident occurred; that when he reached Elizabeth street, a north and south cross street, a trace became unhooked, and that he jumped out of the wagon and attached the trace to the hook; that as he was getting back on the wagon he noticed a street car coming behind him; that he started to turn his horse off the track when the car was about fifty feet behind him; another witness estimates the distance between the car and the wagon when the wagon started to turn off the track at about 150 feet; that while plaintiff was in the act of turning off the track the street car struck

the rear wheel of the wagon, causing the horse to jump across the track, turning the front end of the wagon on the car tracks, and that the street car then struck the front wheel of the wagon, knocking the plaintiff's horse down, throwing the plaintiff off the wagon, and pushing horse, wagon and plaintiff a distance estimated from 50 to 175 feet by various witnesses. The car in question was going at a rate of speed estimated by plaintiff's witnesses from 18 to 25 miles an hour. The car did not slacken its speed before striking the wagon. The wagon, horse and harness were damaged and the plaintiff received injuries.

The defendant introduced evidence tending to show that the car was running east on 51st street and had stopped at Elizabeth street; that the next street east of Elizabeth street is Center avenue, and the block is a short one; that in the middle of that block the motorman saw the horse and wagon of plaintiff moving along on the south side of the street in the roadway between the car tracks and the curb; that the driver got down from his wagon and ran back between it and the curb, where he picked up an object from the street, which some of the witnesses say looked like a nickel; that after he picked this up he returned to his wagon; that the car was coming nearer to the wagon all the time, and that when the front end of the car had reached within a distance of twelve feet from the wagon the horse turned suddenly toward the track in front of the car, and before the motorman could stop the car the running board struck the horse and knocked him down. The speed of the car as testified to by defendant's witnesses was from six to ten miles an hour. The motorman claimed that when the horse turned in front of the car he put on his reverse power, so that the car stopped almost as soon as it struck the horse.

The conflicting stories as to how the accident happened were properly submitted to the jury for its determina-

tion as to which was entitled to greater credence. The number of witnesses testifying as to the occurrence was about the same on either side. If the jury believed plaintiff's witnesses, as it evidently did, the defendant was guilty of the negligence charged, and plaintiff was free from contributory negligence. It was a close case on the facts, but we are unable to say that the verdict is manifestly against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.

378 - 19412

HENRY D. LAUGHLIN,
Appellee,

vs.

CHARLES H. NORTON and HENRY P. NORTON,
Appellant.

Appeal from
Municipal Court
of Chicago.

187 I.A. 257

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment in the Municipal Court of Chicago against appellants for $1891.30 and costs. This appeal is prosecuted to reverse it.

The case was tried before the court without a jury. Plaintiff filed the common counts and a bill of particulars in which he claimed that he had loaned the defendants on three separate occasions sums of money aggregating in all $4017.75. The defendants, appellants here, filed a set-off claiming money due from the plaintiff to defendants as follows: $2046.82 due to the defendants from the plaintiff upon a certain land contract between the parties, dated May 6, 1905, and $1251.35 due upon another land contract between the parties, dated October 31, 1905, which sums, with interest, amounted to $4487.36, and giving the plaintiff credit for $1277.08, for cash paid them May 31, 1907, on account of contracts, with interest at five per cent., making $1277.08, leaving a balance due the defendants of $3210.28. The plaintiff filed an affidavit of merits to the set-off, denying that defendants performed under the contract of October 31, 1905, and alleging that he did not waive any of the provisions of the contract and was entitled to a credit of $1891.30, as payment upon the contract of May 6, 1905.

The controversy grows out of several different land

contracts whichit will be necessary to state in substance.

Prior to any negotiations with plaintiff Laughlin, the defendants had acquired certain rights in two contracts for the sale of timber land in Wisconsin. The first of these contracts is known as "contract 530," whereby the North Wisconsin Lumber Company agreed to sell certain described land to one Savage, who assigned his right to defendants. The second contract, known as "contract 527," was between the same original parties and was acquired by appellants in the same manner as contract 530, and concerned different lands.

On January 18, 1905, defendants and plaintiff entered into an agreement respecting said contract 530. By the terms of this agreement defendants and the Namekagon Land & Lumber Company assigned their rights under said contract 530 to plaintiff as security for $1891.95, stated therein to have been advanced to defendants by plaintiff to pay some instalments due thereon January 15, 1905. In this contract appears what is referred to in the testimony as the option given plaintiff to purchase the land described in the contract, which is material here and is as follows:

> "But coupled with this assignment and pledge of said contract is the option given to said Laughlin to pay off all future payments on the lands described and thereby become entitled to a deed for the lands direct from said North Wisconsin Lumber Company, provided he exercises this option within eight months from this date and at the time he does so pays the Namekagon Land & Lumber Company the sum of ($2046.82) Two Thousand Forty-six Dollars and eighty-two cents, and at the same time executes and delivers to the parties of the first part a release in full for the moneys by him advanced purmuant to this stipulation."

At the time of the execution of the January 18, 1905, contract, plaintiff Laughlin delivered to defendant C. H. Norton his check for $1891.95, which he claims was a loan, and for which he recovered judgment below. May 6, 1905, the parties entered into a contract bearing that date whereby the rights of the defendants, under said contract 530, were assigned to plaintiff. The two

contracts of January and May, 1905, described the same land, constituting 1033 and a fraction acres.

Subsequently,on October 31, 1905, the same parties entered into another land contract by the terms of which defendants agreed with the plaintiff to assign to him the entire interest of the original purchaser in certain described lands which the defendants held by virtue of an assignment of a contract between the North Wisconsin Lumber Company and one John Savage, above referred to as "contract No. 527," for the sum of $1251.35, and the assumption by the plaintiff of five deferred payments to become due under the contract. This contract provided that the defendants should confirm by deed such assignment, in manner and form to the satisfaction of the plaintiff, and from all the parties in interest, including shareholders of the Namekagon Land & Lumber Company, and also obtain the consent of the North Wisconsin Lumber Company to the assignment or transfer to the plaintiff of said contract No. 527.

It is claimed by the plaintiff and he so testified that in September, 1905, prior to signing the contract of October 31st, the defendant, C. H. Norton, told him there was a payment coming due on the contract No. 527, concerning which defendants and plaintiff were trying to make an agreement, and defendant , C. H. Norton, asked plaintiff to advance the amount due, which he would treat as a loan in case the contract was not consummated, or upon account of the contract if it was consummated later. The amount due on the contract was $1125.80. Plaintiff further testified and claimed that on October 30, 1905, he executed and delivered a check to the order of William R. Moss, attorney for the defendants, for $1125.80, and that later, in May, 1907, C. H. Norton againstated to the plaintiff that they were still in trouble growing out of the lumber venture in Wisconsin; that he, Norton,

wanted to make a dividend among the others interested in the land, and asked plaintiff to let him have $1000 as a loan if the deal then pending did not go through; that thereupon plaintiff delivered to defendant his check for $1000, payable to the order of William R. Moss, dated May 21, 1907. Plaintiff's testimony as to this conversation was denied by Norton. Plaintiff also testified that he never took possession of the premises described in the October 31, 1905, contract, nor did he exercise any rights therein, and that he never received the consent of the North Wisconsin Lumber Company to the assignment to him of contract No.527, as provided by the terms of the October 31st contract .

It was claimed by the defendants that Laughlin, the plaintiff, waived the procurement by the defendants of the consent of the North Wisconsin Lumber Company to this assignment, and agreed to attend to that matter personally, and that the interest of all parties in the lands described in the contract of October 31, 1905, including the shareholders of the Namekagon Land & Lumber Company, was conveyed to the plaintiff.

It was further contended on the part of the defendants that Laughlin elected to exercise his option contained in the agreement of January 18, 1905, out of which the contract of May 6, 1905, grew.

The trial court in reaching its judgment found that the $1891.95 mentioned in the contract of January 18, 1905, was a loan, and that the burden of proving payment thereof was on the defendants, and that they had failed to sustain that burden. The court held that the contract of October 31, 1905, was not fulfilled by the defendants; that the plaintiff Laughlin had advanced $1135.81 to apply on the contract of October 31, 1905, and also the $1000 loan of May 21, 1907, to apply on that contract if it was ever completed; that the plaintiff was entitled to interest on the sum

of $1891.95, which amounted to $717, making a total of $4735.12. As against this amount, the court found that defendants were entitled to a credit of $2046.82, named in the contract of May 6, 1905, with interest, making a total of $2839.92, and leaving a balance of $1895.20 due plaintiff.

Upon a review of the evidence, we are of the opinion that the loan of $1891.95 mentioned in the contract of assignment of January 18, 1905, was applied on the Savage contract known in the record as Contract No. 530, in the exercise of the option contained in the assignment contract of January 18, 1905, by the plaintiff Laughlin, prior to the contract of May 6, 1905, and that by agreement between the plaintiff Laughlin and defendants the receipt of the payment of the check for $1891.95 to the North Wisconsin Lumber Company, together with $130 advanced by defendants, and endorsed on the contract by the Lumber Company, operated as a release and discharge of the loan. By the terms of the contract of January 18, 1905, if Laughlin exercised his option to buy the land he was to make the future payments due on the land, pay the sum of $2046.82 and release in full the moneys by him advanced, namely, the $1891.95. The evidence in the record shows, we think, that appellants raised the amount of money necessary and used Laughlin's check of $1891.95, and, with the money and check, made the payment due in January under the terms of the contract, upon Laughlin's request and upon his agreement to take an assignment of the contract, or, in other words, to exercise his option. This was done in the early days of May prior to the execution of the May 6th contract. The testimony of Moss and C. H. Norton, together with the writings, show that this was done in partial execution of the contract of January 18, 1905. The parol testimony offered and received on this question did not tend to vary or change the contract of May 6th. It showed what was said and done by the parties under and in execution of the contract of January 18, 1905, and was com-

patent for that purpose under the issues in the case. The manifest preponderance of the evidence on this question is with appellants.

On the issue as to whether the contract of October 31, 1905, was substantially performed on the part of defendants, we think the finding of the court was against the clear weight of the evidence. It clearly appears without controversy in the evidence who were the stockholders of the Hamekagon Land & Lumber Company, and that they owned all of the stock. All of the stockholders, (except Olin Kenyon) and the company itself joined in a quit claim deed, dated October 31, 1905, to the plaintiff Laughlin. This deed was delivered to Laughlin, and, at the same time, a deed from Kenyon was delivered to him. The evidence does not show that defendants obtained or delivered to the plaintiff the consent of the North Wisconsin Lumber Company to the assignment of contract No. 537 to Laughlin, as provided by the terms of the contract of October 31, 1905. The procurement of this consent, however, was waived, as shown, by the clear and direct testimony of appellants, and of Moss. Against this testimony is that of plaintiff, denying that he waived the procurement of the consent by defendants and agreed to obtain it himself. We think the clear weight of the evidence on this point must be held to be with defendants. We regard the law as settled in this state that covenants contained in an executory sealed contract may be waived by parol by the party for whose benefit they were inserted, provided no new element or terms are added; and the party to a contract so waiving one of its terms or covenants will be estopped to insist that such covenant was not performed by the other. (Becker v. Becker, 250 Ill. 117; Moses v. Loomis, 156 id. 392; Worrell v. Forsyth, 141 id. 28.)

The plaintiff Laughlin, according to the evidence, stated that he would attend to procuring the consent of the North Wisconsin Lumber Company himself. By this affirmative act or state-

ment on his part, he induced the defendants to believe that a strict performance of the covenant would not be required or would be waived. Relying upon this, the defendants did not obtain the consent of the Lumber Company as they would have done. It would be a fraud upon defendants to permit the plaintiff to thus put them off their guard and lead them into omitting to perform, and then when it is too late for them to perform, insist that they have failed to keep their covenant.

There is some question made in the evidence as to whether any deed from Kenyon was ever delivered to the plaintiff. This arises as an inference from plaintiff's testimony that he had delivered to Mr. Jones, of counsel for plaintiff, all the deeds which he received from the defendants or William R. Moss, and it was agreed on the trial that if Jones took the witness stand he would testify that he had produced in court all deeds turned over by the plaintiff to his counsel. It appeared that no deed from Kenyon was among the papers. The testimony of Mr. Moss, is direct and positive that among the papers he delivered to the plaintiff was a quit-claim deed of Kenyon to the property described in the October contract. If, however, a quit-claim deed from Kenyon was not obtained it would not have been such a failure on the part of defendants to perform their contract as would have entitled the plaintiff to abandon or rescind the agreement and recover payments made thereon. The original contract, concerning which the October contract was made, was assigned by Savage, the original purchaser, on May 12, 1904, to C. H. and H. E Norton, and on October 23, 1905, the Nortons assigned and transferred all their rights therein to the plaintiff. Plaintiff thereby obtained all that it was possible for him to obtain. The shareholders of the Nanekagon Land & Lumber Company do not appear to have had any rights in the contract, and deeds from them were useless and of no legal effect.

In order to justify Laughlin in rescinding the contract and recovering the money paid, defendants must have failed in a substantial manner to observe their part of the contract. The object of the contract must have been defeated or rendered unattainable by defendants' misconduct or default. (Weintz v. Hafner, 78 Ill. 87; Leopold v. Salkey, 89 id. 412; Pittenger v. Pittenger, 208 id. 582.) The evidence bearing on this question considered, we are of the opinion that defendants substantially performed the October 31, 1905, contract. Laughlin, therefore, has no right to recover back the $1135.80, the amount of the check payable to William R. Moss, dated October 30, 1905, or the advance of $1000 made May 31, 1907; and it follows further that the defendants are entitled to recover from Laughlin on their set-off the sum of $2046.85, provided by the contract of May 6, 1905, to be paid to defendants by plaintiff with interest. Defendants are also entitled to recover the sum of $1351.35 agreed to be paid by plaintiff to defendants by the contract of October 31, 1905, with interest from April 30, 1908. Plaintiff is entitled to a credit against these items of $1000, cash paid May 31, 1907, on account of contract of October 31, 1905, by plaintiff to defendants.

The judgment is, therefore, reversed and judgment is entered here on a finding in favor of appellants, defendants below, and against appellee, plaintiff below, for $3,210.28.

REVERSED AND JUDGMENT HERE.

ctober Term, 1913. No.

181 - 19570

GEORGE F. VIETOR et al.,
Defendants in Error,

vs.

JACOB H. LESHER et al.,
(Defendants)
Co-plaintiffs in Error
BELLE LESHER (defendant),
Plaintiff in Error.

Error to
Superior Court,
Cook County.

187 I.A. 266

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The same questions are presented and upon the same state of facts as are presented in 19571 - American Woolen Company v. Lesher et al., in which an opinion is this day filed. This case is controlled by the principles discussed in that opinion, and for the reasons there stated, the decree is affirmed.

AFFIRMED.

October Term, 1913. No.
286 - 19683

ALBERT BOLLA, Defendant in Error,

vs.

M. E. MARTIN, Plaintiff in Error.

Error to Municipal Court of Chicago.

187 I.A. 266

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought by defendant in error, Albert Bolla, against plaintiff in error, M. E. Martin, in the Municipal Court of Chicago to recover a commission for the alleged sale of two lots in Detroit, Michigan, owned by plaintiff in error and his wife. The contract is expressed in certain letters written by the plaintiff in error in which he finally authorized Bolla to sell the two lots for $1600, out of which the agent was to take a commission of $75.

Bolla made a sale of the two lots to Detroit parties at $850 each, or $1700 for the two lots, but reported to the plaintiff in error that he sold the two lots for $1600 to Emma Pavella, his wife,- that being her maiden name. Bolla sent the plaintiff in error $50 to apply on the contract and told plaintiff in error that he had sold the two lots for $1600 to Emma Pavella, and to hurry up the contract as the purchaser was about to leave the city. Plaintiff in error, recalling the fact that the maiden name of Bolla's wife was Emma Pavella, became suspicious that everything was not right, repudiated the sale, sent back the $50 to the agent and had his (Martin's) wife go to Detroit to investigate. As a result of the investigation it was developed that the agent had made contracts for the sale of the two lots for $850 each, or $1700, while the sale reported was made to the agent's wife for $1600. Defendant in error thereupon commenced an action for his commission

and recovered a judgment for the full amount of commission and costs.

There is no substantial controversy as to the material facts in the case. That an agent must exercise a high degree of integrity and must show fidelity and cannot speculate with the principal's property for his own benefit is established by a long line of authorities in this and other states. The law is so well settled that it is hardly necessary to cite authorities. In Tyler et al. v. Sanborn et al., 128 Ill. 138, it is held that an agent appointed to sell property cannot, either directly or indirectly, have an interest in the sale of the property of his principal without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the interest of the principal. It is of no legal consequence in such a case that no fraud was actually intended or that no advantage was in fact derived from the transaction by the agent. The rule is not merely remedial of a wrong actually committed, but is intended to prevent a wrong. An agent may undoubtedly buy of his principal, or have an interest in the sale of the property belonging to his principal, but in such a case the burden is upon the agent to show that the principal had knowledge not only of the fact that the agent was buying or interested in the sale, but also of every material fact known to the agent which might affect the principal, and that having such knowledge he freely consented to the transaction. This rule is equally applicable to cases where the agent is empowered to sell at a stated price, as where his authority is to sell generally.

The evidence in this record shows that the defendant in error, Bolla, was originally authorized to sell the lots for $1800 and to take his commission of $75 out of the selling price. That price was submitted by the agent to the prospective purchasers but they would not pay it; thereupon Bolla, by correspondence, induced the plaintiff in error to reduce his price to $1600, out of

which he was to take his commission of $75. Having secured this latter price from plaintiff in error and having made a sale of two lots for $1700 to two purchasers, Bolla reported the sale to his wife by her maiden name for $1600, but did not inform the plaintiff in error of the actual facts of the sale. The only inference that can be drawn from the evidence is that the defendant in error, Bolla, by the terms of the sale to the parties in Detroit, would have made $100 on the lots besides his commission if the sale had been carried through. In this we think the defendant in error fell far short of his duties and obligations to the plaintiff in error and justified the latter in repudiating the sale. (Mechem on Agency, Secs. 454, 481, 464; Hafner v. Herron, 165 Ill. 248.) In the last cited case it was held that a broker, concealing the real purchaser from his principal, thereby inducing him to sell at a less price than he would have done had the purchaser been disclosed, is not entitled to a commission though no fraud was intended,- not because of the injury to his principal, but from considerations of public policy.

There was no attempt by defendant in error, Bolla, to show that the plaintiff in error consented to the sale in question after full knowledge of every matter known to the agent had been given him. It is clear also from the evidence that Bolla would have derived an advantage if the sale had been completed to which, under the law and the facts, he was not entitled. The defendant in error is not entitled to the commission sued for and the judgment is erroneous and contrary to law. The judgment is reversed.

REVERSED.

arch Term, 1914. No.
243 - 20173

GEORGE KOUTSOGIANIS,
Defendant in Error,

vs.

GEORGE GOUMAS,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 268

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Motion is made by the defendant in error to strike from the record the bill of exceptions or statement of facts and to affirm the judgment of the Municipal Court.

The record shows that the bill of exceptions or statement of facts was not presented to the trial judge or filed with the clerk of the Municipal Court until the lapse of more than thirty days from the entry of the judgment in the cause, and that no order extending the time for filing the bill of exceptions had been entered by the Municipal court within thirty days from the entry of the judgment. It appears from the record that the judgment was entered December 1, 1913, and that on December 26, 1913, a motion was made to vacate the judgment in that court. On January 17, 1914, the motion to vacate was overruled and denied. On February 18,1914, a bill of exceptions was presented to the trial judge, and on March 7, 1914, the bill of exceptions was filed as of February 18, 1914. It, therefore, clearly appears that the bill of exceptions or statement of facts was first presented to the trial judge more than thirty days after January 17, 1914, the date on which the motion to vacate the judgment was overruled. The motion to strike the bill of exceptions or statement of facts from the record must, therefore, be sustained. (Illinois Brewing & Malting Co. v. Ilmberger, 155 Ill. App. 417; Burr v. Co-operative Construction Co., 162 id. 512.)

The plaintiff in error presents a cross-motion for leave to file additional briefs based upon assignments of error Nos. 3 and 21, and the common law record filed in the case. Assignment of error No. 3 is that the finding is in contravention of the law, and assignment of error No. 21 is that the court erred in overruling the motion of defendant to vacate the judgment entered upon the finding in favor of the plaintiff and against the defendant. The abstract of record discloses no basis in the common law record for consideration of the above assignments of error. The bill of exceptions or statement of facts being stricken from the record, we cannot consider the assignments. The motion of plaintiff in error, to file additional briefs based upon the assignments of error mentioned in the motion, is, therefore, denied.

The judgment is affirmed.

AFFIRMED.

AFFIRMED.

October Term, 1913. No.

189 - 19578

GEORGE A. MUGLER, as executor of the last will and testament of MARIE HIRSCH, deceased,
Appellant,

vs.

JAMES H. HIRSCH, doing business under the firm name and style of JAMES H. HIRSCH & CO.,
Appellee.

Appeal from Municipal Court of Chicago.

187 I.A. 279

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On or about August 6, 1909, one Jacob L. Hirsch died intestate, leaving his widow, Marie Hirsch, as his sole heir and, among his assets appellee's promissory note for $1500, payable to the order of said Jacob L. Hirsch three years from April 26, 1909. On or about April 7, 1911, said Marie Hirsch died and left said note among her assets and this suit was brought by her executor to recover the sum due thereon. By his affidavit of merits appellee claimed that there was nothing due "in excess of $516," whereupon judgment for that sum was given and the cause proceeded to trial before the court without a jury as to the remainder alleged to be due. Proof having been received of payment of the balance due, the court found in favor of appellee and rendered judgment against appellant for costs from which this appeal was taken. The main question for consideration is the competency of such proof.

Over the objection made by appellant that appellee was not a competent witness, the latter was permitted to testify that he had made payment of said balance to Jacob L. Hirsch in different instalments from time to time prior to his death. His bookkeeper testified that she saw such payments made, and made entries thereof in appellee's books at his direction, but she did

not personally know for what purpose the payments were made. The motion to strike out her testimony was denied.

Appellee was also permitted to testify to such entries in his books, which had been previously destroyed, and to introduce copies of said entries in evidence. Neither the testimony of appellee nor that of his bookkeeper should have been admitted. He was incompetent to testify, coming, as he does, within the express language of Sec. 2, Chap. 51, R. S., on Evidence and Depositions, inhibiting any party to a civil action from testifying in his own behalf when an adverse party sues as an executor of a deceased person. The contention of appellee that such provision of the statute is not applicable where the transaction with reference to which the suit was brought was not one with said deceased person but with someone else, has no merit, and such a state of facts does not bring the case within the letter or intent of any of the exceptions to said section.

Hence none of appellee's testimony should have been received.

The motion to strike out the testimony of the bookkeeper should have been allowed in the absence of proof, the burden of which was upon appellee, to show that the payments the bookkeeper witnessed were intended to be applied upon the note in question. For aught that appears from the record, such payments may have been for entirely different purposes.

Neither is there merit to the contention of appellee that the judgment for $516 was res judicata. The statement in his affidavit of merits that "there is nothing due to the plaintiff on said note in excess of $516," was tantamount to an admission that the latter sum was due, thus justifying judgment therefor, which was an adjudication only to the extent of the sum so admitted to be due, the other matters being expressly reserved for hearing under the issues formed.

For the errors of the court, the judgment must be reversed and judgment will be entered here for the amount remaining due on the note. It appears that the sum of $516, for which judgment was given, as aforesaid, on June 6, 1913, was paid on that day, leaving then due upon the note $1264.25, which with accrued interest now amounts to $1414.25, for which judgment will be entered here.

REVERSED WITH JUDGMENT HERE
AND FINDING OF FACT.

1115

tober Term, 1913. No.

243-19634

MEYER NORDEN,
Appellee,

vs.

REMINGTON TYPEWRITER COMPANY,
a Corporation,
Appellant.

Appeal from
County Court,
Cook County.

187 I.A. 231

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Norden, the plaintiff below, was employed as a salesman of appellant, defendant below, to sell typewriting machines. The contract between them was not in writing, but was upon express terms as to a weekly salary and amount of commissions on each machine sold. On August 15, 1911, he secured a contract with Armour & Company to purchase of defendant 200 typewriters of the style known as the Remington, and such additional number as it might take before August 15, 1913, deliveries thereof to be made from time to time. In December, 1911, plaintiff left defendant's employ. In 1912, another agent of defendant negotiated an arrangement with Armour & Company to take other styles of typewriters called the Monarch and Smith Premier, and deliveries of a certain number of them were made in the summer of 1912. This suit involves the right of plaintiff to commissions on Monarch and Smith Premier typewriters so delivered. Plaintiff contends, in short, (1) that he is entitled to commissions on all typewriters taken by Armour & Company pursuant to the contract of August 15, 1911, and (2) that after he left defendant's employ there was a modification of the contract, without his consent, whereby the Monarch and Smith Premier typewriters were substituted for Remington, and that he is entitled to commissions on those so substituted.

One of the questions of fact is whether the contract

for Monarch and Smith Premier typewriters was a modification of the contract for Remington typewriters. Consideration of that question, however, would be unnecessary if, as defendant contended, the terms of plaintiff's contract of employment did not entitle him to commissions on any machine delivered after he left its employ. Testimony that such were the express terms of the contract was given by Noyes, defendant's manager, who made the arrangement with plaintiff. On motion of plaintiff's counsel, however, the testimony was stricken out on the theory that defendant was seeking to establish a forfeiture as an affirmative defense and that it could not be shown under the general issue. This was a misapprehension of the point at issue, namely, what were the real terms of the contract. Except for such misapprehension it is difficult to understand upon what theory plaintiff was permitted, and defendant's witness denied the right, to give his version of the oral contract sued on when its terms were in dispute. The first question for the jury's determination was what was the contract. It resting in the recollections of these two persons who made it, of course either one was competent to testify thereto. Had the stricken testimony been submitted to the jury and accepted as the correct version of the contract, then there could have been no recovery, whatever relation, if any, the second contract bore to the first. For error in striking out such testimony the judgment must be reversed and the cause remanded for a new trial.

It is urged that the court erred in sustaining demurrers to special pleas setting up in effect that the terms of the arrangement set forth in the evidence stricken out were in accordance with the usage and custom in defendant's business. It is, perhaps, enough to say that the evidence excluded was admissible for the purpose above stated, but not on the ground pleaded. Whatever may have been the usage in defendant's private business, it could not

be construed into a general custom on whatever theory such a custom might be proved. The custom pleaded was not material unless it became so by agreement, and proof of such an agreement was admissible under the general issue.

In reply to the contention that there was error in striking out the testimony of the witness Hayes, appellee contends that the point has not been properly saved in the record of the motion for a new trial. The motion, however, was not necessary to preserve the question for review as the exceptions to the ruling of the court were sufficient for that pur ose. (Yarber v. C. & A. R. R. Co., 235 Ill. 589.)

REVERSED AND REMANDED.

Mr. Justice Clark took no part in this decision.

March Term, 1913, No.

380 - 19286

1117

MARCELLA WISTAFKA, a minor, by ELIZABETH WISTAFKA,
Appellee,

vs.

PETER M. GROTOWSKI,
Appellant.

Appeal from
Superior Court,
Cook County.

187 I.A. 285

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The appellee in this case was severely bitten by a dog claimed to have been owned by appellant, and a judgment was rendered in her favor in the sum of $500, being based on the verdict of a jury for a like amount.

On a re-examination of the record in this case we have reached the conclusion that the judgment should be reversed and the cause remanded. In the recent case of Domm v. Hellenbeck, 256 Ill. 382, it is said that "if the owner of a vicious animal knows its character and disposition to commit injury to mankind he is liable for all injuries it may inflict. The natural presumption from the habits of dogs is that they are tame, docile and harmless, both as to persons and property, and the owner of a dog is not liable for damages resulting from the vicious or mischievous acts of the animal unless he had knowledge of his mischievous or vicious propensities, and such knowledge must be proved."

A Mrs. Doherty testified that four years before the trial, and perhaps one year before the plaintiff was bitten, she saw the dog bite a boy. She said she knew the dog two years before the occurrence. On cross-examination she said she did not know what boy it was that the dog bit; that she never told anybody about it except the attorney for plaintiff and her mother. She

further testified on cross-examination that "I can't swear it was Mr. Grotowski's dog; he came from his yard. There were other dogs in his yard; I couldn't swear now that it was Mr. Grotowski's dog that was back there. The dog came from his yard and I saw him often. I never saw Mr. Grotowski with the dog."

The defendant testified that no one ever complained to him that his dog was cross.

We do not think the indefinite testimony of Mrs. Doherty sufficient proof of the fact that defendant's dog was the one which she claims to have seen attack a boy. Even it be assumed that it was the same dog, there is nothing in the record to which our attention has been called that would indicate that the defendant had knowledge of the incident. The record is also lacking in convincing proof that it was defendant's dog which assaulted plaintiff.

For the reasons stated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1913. No.
269 - 19665

A. D. FELL, Admr. Estate of Mathias O. Fell, deceased,
Plaintiff in Error,

vs.

CHICAGO BUILDING & SPECIAL CONSTRUCTION COMPANY and OSCAR S. EIGER,
Defendants in Error.

Error to Circuit Court, Cook County.

187 I.A. 286

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This suit was brought by A. D. Fell as administrator of the estate of Mathias O. Fell, deceased, to recover damages against the Chicago Building & Special Construction Company and Oscar S. Eiger, on account of the death of plaintiff's intestate, alleged to have been occasioned by the negligence of the defendants. A similar suit was also brought by the same plaintiff as administrator of the estate of Josephine M. Fell, against the same defendants (No. 19,664, see opinion filed this day). The cases were tried together in the Circuit Court. In each of the cases there was a verdict in favor of the plaintiff,- as administrator of the estate of Josephine M. Fell in the sum of $7,500, and as administrator of the estate of Mathias O. Fell in the sum of $8,500,- against the defendant Building Company, upon each of which verdicts a judgment was rendered. There was also a verdict in each case by direction of the court in favor of the defendant Oscar S. Eiger. From judgments for costs in the two cases in favor of Eiger writs of error are prosecuted.

The death of the two children was caused by the falling of a terra cotta cornice on a building being constructed for the defendant Eiger by the defendant Chicago Building & Special Construction Company.

That the accident was due to faulty construction was abun-

1889 — 12888

E. A. Hall, Adm. Trusts of
Benjamin F. Hall, deceased.
Plaintiff in error,

vs.

Defendants in Error.

dantly shown. The principal question presented by these writs of error for review is whether the trial judge correctly held that the defendant against whom the verdicts and judgments were rendered was an independent contractor. The contract between the defendants for the construction work was offered in evidence by the plaintiff. The contract provided that for the sum of $14,500 the Construction Company should provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by one Newhouse, an architect, for the work complete on the two-story and basement building at 541-43 W. North avenue, in the city of Chicago. The architect was named in the contract as "superintendent of the work for the completion of the building," and his duties were enumerated to be: faithfully to enforce all the conditions of the contract; to furnish all necessary drawings and information that is required to properly illustrate the design given; and to make estimates for the contractor as to the amount due him on the contract. The usual provisions are embraced in the contract, setting forth that it was not the architect's duty to notify the contractor to attend to and have in readiness his own work; that the architect would in no manner be responsible for any errors or deviations from plans, and the contractor was forbidden to make any alterations in the work except upon the written order of the architect.

With respect to the terra cotta work the contract provided that the Construction Company should furnish the architect with jointing and anchoring diagram for his approval. It also provided that the contractor should give a separate figure for setting the terra cotta, which figure was to include anchors. The record shows that a contract for the furnishing of the terra cotta was let by the Construction Company to the Northwestern Terra Cotta Company; that plans for jointing and anchoring the terra cotta were sent to the architect and were approved by him and sent back to the

Terra Cotta Company. The evidence in the case is undisputed that the plans in addition to showing the manner in which the terra cotta should be set up or joined, also showed the way in which it should be anchored, and that each individual piece of the terra cotta was to be anchored to the structural members of the building by means of iron rods, the function of the rods being, as described, "to come up through the brick work and to go through the hole in the terra cotta with a nut on the top to hold the terra cotta down."

The question as to whether or not the Building Company was an independent contractor was one to be determined by the court on its construction of the contract between the Building Company and Eiger, the owner. This contract, as heretofore stated, was offered in evidence by the plaintiff. We are of the opinion that the trial judge properly decided that the provisions of the contract were such as to establish the fact that the Building Company was an independent contractor. In Hale v. Johnson, 80 Ill. 185, the following rule laid down by text-writers was approved and adopted, and seems to have been followed consistently in every case of like nature upon which the court has been required to pass:

> "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accord with his own ideas, or in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant, and a person injured by his negligence in the performance of the work would have no right of action against the party for whose benefit the work is being done."

The evidence in the case clearly establishes that the fall of the terra cotta cornice was due to the fact that the Construction Company did not carry out the plans for jointing and anchoring it, which plans were submitted by the Construction Company to the architect and approved by the architect. The jury, therefore, properly rendered against the contractor the verdicts upon which judgments were entered.

While the plaintiff did not attempt to prove on the main case that there was any fault in the plans or specifications, but relied wholly, as stated in the briefs, upon the doctrine of res ipsa loquitur, it was attempted to be shown on rebuttal that an employee or superintendent under the architect approved the method of anchoring the terra cotta which was adopted. The contract provided that no change in the plans should be made except upon the written order of the architect, and no attempt was made to show that there was any such written order. Nor did the testimony offered tend to rebut anything brought out in the defendant's case. If the testimony proffered had been introduced, we are of the opinion that the court would still have been justified in directing the verdict of not guilty as against Eiger.

We find no error in the record such as should cause a reversal of the judgment in this case, and the same is therefore affirmed.

AFFIRMED.

tober Term, 1913. No. 1119

368 - 19664

A. D. FELL, Admr., Estate of Josephine M. Fell, deceased, Plaintiff in Error,

vs.

CHICAGO BUILDING & SPECIAL CONSTRUCTION COMPANY, a corp., and OSCAR S. EIGER, Defendants in Error.

Error to Circuit Court, Cook County.

187 I.A. 288

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this suit a judgment of $7,500 was recovered in favor of the administrator of the estate of Josephine M. Fell and against the Chicago Building & Special Construction Company, based upon the verdict of a jury. The case was one brought for damages for the death of plaintiff's intestate, due, as was charged, to the negligence of the Construction Company and one Oscar S. Eiger, who was also joined as defendant.

The trial court directed the jury to find a verdict in favor of Eiger, upon the ground that the accident was wholly due to the negligence of the Construction Company, which was an independent contractor.

The case was tried in connection with one brought by the plaintiff as administrator of the estate of Mathias O. Fell, deceased, each case having been brought to this court by the plaintiff by writ of error. The facts in the case have been considered in the opinion this day rendered in case No. 19,665, both cases having arisen out of the same accident. For the reasons stated in the opinion last referred to, the judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this suit a judgment of $7,500 was rendered in favor of the administrator of the estate of Josephine V. Bell against the Chicago Building & Special Construction Company, based upon the verdict of a jury. The case was one brought for damages for the death of plaintiff's intestate, who, he was alleged, on the negligence of the Construction Company and Peter C. Kiley, was also joined as defendant.

The trial court directed the jury to find a verdict in favor of Kiley, upon the ground that the accident was wholly due to the negligence of the Construction Company, which was an independent contractor.

The case was tried in connection with one brought by the plaintiff as administrator of the estate of Matilda G. Bell, deceased, also being brought to this court by the plaintiff in error. The facts in the cases have been consolidated in the opinion this day rendered in case No. 19,958, both cases having arisen out of the same accident. For the reasons stated in the opinion last referred to, the judgment of the Circuit Court is affirmed.

AFFIRMED.

October Term, 1913. No.

370 - 19675

1180

COLUMBIA INSURANCE COMPANY,
Plaintiff in Error,

vs.

LOEB'S INSURANCE AGENCY,
Defendant in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 289

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The claim of plaintiff as set out in the statement is for premiums upon insurance policies issued by the plaintiff and delivered to the defendant as a broker, which premiums, less a commission of 15 per cent. allowed the defendant, it is alleged the defendant agreed to pay the plaintiff.

The general agent for the plaintiff testified that in 1913, one Cady was an agent in Chicago of the plaintiff and authorized to countersign and deliver policies and collect premiums; that in the fall of that year Cady became a defaulter; that witness advised Leo A. Loeb, president of the defendant, of that fact and also told him that plaintiff was sending letters to all persons to whom Cady had issued policies, notifying such policy holders not to pay any further premiums to Cady; that if Loeb would furnish plaintiff with a list of policies which Cady had issued and delivered to the defendant, the premiums on which were still unpaid, plaintiff would not send notices to such policy holders; that Loeb referred witness to defendant's bookkeeper for the information desired; that the bookkeeper prepared a statement showing the receipt of six policies the premium on which, less a deduction of 15 per cent. commission, amounted to the sum mentioned in the statement of claim. The witness further testified that neither the bookkeeper nor Loeb said anything to the witness at

that time about the defendant having a claim of set-off on account of the premiums due on the above mentioned policies; that the witness saw Loeb several times and asked him to pay the premiums and that Loeb then stated that he had an offset on account of a personal note made by Cady and held by the defendant.

Loeb's statement that he had a set-off would not amount to an admission that the defendant had been paid. His testimony was to the effect that in 1918 the witness applied to Cady as a broker for policies of insurance covering risks on automobiles; that he did not know that Cady was agent for any individual company; that from time to time Cady delivered policies to the defendant and presented bills for payment on his personal billheads and the bills were paid from time to time; that witness did not know that Cady was the agent of the plaintiff or that any of the policies delivered to the defendant by Cady were countersigned by him as agent. He further testified that in payment of a premium on a life insurance policy procured by the defendant for Cady the defendant took Cady's note; that on the maturity of the note it was presented to Cady for payment, and that Cady directed the witness to deduct it out of the amount owing by the defendant to Cady for premiums.

The statement of facts filed in this case is not such a statement as is contemplated by the statute. It gives in narrative form what purports to be the testimony of the witnesses. The point is made by the defendant that the record does not show that the defendant ever collected the premiums upon the six policies heretofore referred to, and we are unable ourselves to find such proof in the record. It has many times been decided that a broker who procures insurance for another is not liable for the premium unless he collects it.

Propositions of law were submitted by the plaintiff after the finding and judgment were entered and, as stated in the

statement of facts, were refused for that reason. This was not erroneous.

The judgment is affirmed.

AFFIRMED.

tober Term, 1910. No.
243 - 19635

G. A. BURESH,
Defendant in Error,

vs.

M. E. SEYMOUR,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

187 I.A. 295

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

August 10, 1910, plaintiff Buresh and defendant Seymour entered into an agreement in writing whereby they became equal partners in the practice of law in Chicago. Seymour had been practicing law fifteen years; Buresh was without experience and paid Seymour $750 for a half interest in his business. Buresh brought this action in tort against Seymour to recover the money so paid, based on certain alleged misrepresentations of Seymour as to his business. The jury returned a verdict of guilty and for $333.00 damages, and this writ of error is prosecuted by Seymour to review the judgment entered on such verdict. The only actionable misrepresentation alleged or attempted to be proved is the alleged assertion by Seymour that his business was bringing him from one hundred and fifty to two hundred dollars per month and sometimes more than that, over and above expenses. This assertion, if false, was a misrepresentation of a material fact, the truth of which was peculiarly within the knowledge of Seymour, and the evidence tends to show that Buresh relied on such statement and was thereby induced to pay Seymour $750 for a half interest in his business.

A wilful misrepresentations by a vendor affirming that the income from his public house has been greater

1871.A.205

than in truth it was, is an actionable fraud. Bowring v. Stevens, 2 Car. & K. 337. Actions at law have been maintained for deceit as to the rent received from premises or the profit derived from a theatre, or the amount of business done at an inn. Crosland v. Hall, 33 N. J. Eq. 111; Note - Dwight v. Chase, 3 Ill. App. 67; Brown v. Castles, 11 Cush. 348. Representations as to value, probable future business or earnings are not actionable.

The controlling question in this case is one of fact. The burden was on Buresh to prove that the assertion of Seymour that his business was bringing him from one hundred and fifty to two hundred dollars per month, was false. Fraud may be proved by circumstantial as well as by direct evidence; but there must be shown by a preponderance of the evidence inculpatory facts from which a legitimate inference of fraudulent intent may be drawn. Buresh gave evidence tending to show that after he became a partner the receipts of the firm were much less than one hundred and fifty dollars per month, but none to show what in truth Seymour received before the partnership was formed. Seymour testified that for several years before that time he had averaged from one hundred and fifty to two hundred dollars per month; that a large part of the money received came from prisoners in the county jail; that he desired to give up practice in the criminal courts and secure a practice in civil cases. He took Buresh to the county jail, had him registered as a lawyer and Buresh called on the prisoners in the jail when sent for. The civil cases that Seymour had appear to have been cases in which his fees were contingent on the result of the litigation.

In view of the nature of Seymour's business and

the change he attempted to make therein, we do not think that the jury might properly, from the fact that the business of the copartnership amounted to less than one hundred and fifty dollars per month, draw the inference that Seymour's business when he personally attended on prisoners in the county jail did not amount to that sum per month.

The judgment of the Municipal Court is reversed.

REVERSED.

FINDING OF FACT.

The Court finds as a fact that it does not appear from the evidence that defendant Seymour's business as a lawyer before August 10, 1910, did not bring him $150 per month or more.

296 - 19303

rch Term, 1913, No.

ARTHUR B. WRIGHT,
Appellee,

vs.

FREDERICK W. CLARK et al.,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

187 I.A. 309

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Arthur B. Wright, appellee, an attorney practicing in this state, filed a bill against the trustees of two trusts to establish and enforce a lien upon one or both of said trusts for attorney's fees and expenses incurred in connection with a contest of the will of Jonathan Clark, deceased, and to set aside an alleged void arbitration award fixing his fees therein. A decree favorable to appellee was entered by the chancellor, from which the defendants have appealed.

Jonathan Clark died in February, 1902, leaving his widow, Alice Clark, and five children, namely, Frederick W. Clark, George T. Clark, Jonathan Y. Clark, Eunice E. Smith, wife of Shea Smith, and Mamaretta M. Kauffman, wife of Dr. Adam E. Kauffman. All the children were adults at the time of their father's death.

Jonathan Clark left a will dated in 1900, disposing of a large estate. The will provided that the estate should be kept in trust until the expiration of twenty years after the death of the last survivor of his widow and children; that out of the net income in the hands of the trustees should be paid to the widow and children the sum of $3,000 annually to each, and after the death of any child the same amount to be paid annually to the surviving child or children of such deceased child. Provision was also made for payments to Jonathan Clark's brothers and their widows and a half sister, and to Caroline Patterson.

Caroline Patterson was one of the three executors appointed by the will, to whom letters testamentary were issued. Before the death of Jonathan Clark she was his secretary, and the widow and children believed that the relations between her and the testator had been meretricious and that she had influenced his mind and affections adversely to the widow and children. Unsuccessful attempts were made in the Probate Court to prevent her appointment, and unavailing appeals were taken to the Circuit, Appellate and Supreme courts.

In February, 1902, Alice Clark, the widow, renounced the provisions of the will and claimed the statutory one-third of the estate.

In 1866 Jonathan Clark had conveyed to one Scoville, as trustee, about $50,000 in property, the income from which was payable to Alice Clark, his widow. Scoville resigned, and Frederick W. Clark, the oldest son, was substituted as trustee. This trust is called by counsel the "Fred Clark Trust."

Shea Smith, the husband of Eunice Clark Smith, was a client of appellee's, and early in 1903 requested appellee to make an investigation at certain points in the West concerning the birth of a child to Caroline Patterson, together with what might be discovered tending to show that Jonathan Clark was its father. After this trip a meeting was held in April, 1903, at the home of Mr. Smith, attended by the appellee, Shea Smith, Mrs. Smith, Frederick W. Clark and Alice Clark, at which appellee reported the results of his western trip. There was then a discussion as to the contemplated litigation to set aside the will and to remove Caroline Patterson from her position as executrix and trustee.

Appellee was permitted to testify on the hearing before the chancellor that at this meeting the widow and heirs agreed

to pay him his expenses and a fee of $50,000 out of the trust or trusts which might be created, and that he should have a lien thereon for such fee. At the time of the hearing certain defendants to the bill were minors, others were trustees of heirs and devisees, and one was an administrator. Appellee's testimony was therefore inadmissible, and this now seems to be conceded by all, including the chancellor, as indicated in his written opinion. Appellee's statement as to an agreement at this meeting to pay him the fee mentioned, and that he should have a lien on any trust fund or funds for his fees, was denied upon the hearing by the other parties present at the meeting who testified. However, it sufficiently appears from competent evidence that it was understood at this meeting that appellee should represent the widow and heirs in conjunction with some prominent attorney to be selected.

Shortly after this meeting appellee drew an agreement, dated May 4, 1903, which was executed by Frederick W. Clark, as trustee, and the widow and heirs, which is as follows, omitting the lengthy recital of the names:

> "THIS INDENTURE, Made this 4th day of May, A. D. 1903, between * * *
>
> "WITNESSETH: That whereas it is desired by the parties hereto that said party of the first part as trustee as aforesaid be authorized to expend money out of the funds held by him as Trustee under the trust set forth in said deed of trust above mentioned, to be used and expended for attorney's fees and disbursements for and on behalf of the parties to this instrument;
>
> "AND WHEREAS, the said Jonathan Clark being now deceased, the parties to this instrument, are all the parties beneficially entitled to the real estate and premises conveyed by said deed of trust and the proceeds thereof held by said trustee under the provisions of said deed of trust;
>
> "AND WHEREAS, the parties of the third part include all of the children of the said Jonathan Clark, deceased, now living, and all of the children of the said Jonathan Clark, deceased, who were living at the time of the death of the said Jonathan Clark;
>
> "AND WHEREAS, said children of said Jonathan Clark, deceased, parties hereto of the third part, are all of full and lawful age;
>
> "NOW, THEREFORE, the said parties of the second and third part, direct the said party of the first part as trustee under the said deeds of trust above mentioned and

described, to expend and pay any moneys in his possession or control belonging to said trust either out of the principal of said trust funds or out of the income thereof or, partly out of the principal and partly out of the income thereof, for attorneys' fees and disbursements for and on behalf of the parties to this instrument, and that the same be so expended and paid upon the concurring direction of George T. Clark, Fred W. Clark and Shea Smith.

"It is further agreed and understood that the party of the first part be and he is hereby relieved of any and all liability and responsibility to the parties of the second and third parts for or on account of any payments so made by him, and such written direction of said Fred W. Clark and Shea Smith for any such payment shall be sufficient authority therefor and upon compliance therewith shall be a full and sufficient acquittance and discharge by the party of the first part to the parties hereto.

"It is understood and agreed that this instrument shall be and it is hereby made binding upon the parties hereto, their heirs, executors, administrators and assigns.

"IN WITNESS WHEREOF, the parties hereto have hereunto affixed their hands and seals the day and year first above written."

Subsequently, on June 17, 1903, a written agreement was made between appellee and Frederick W. Clark, George T. Clark and Shea Smith, the last three representing the widow and heirs, which is as follows:

"We agree that the compensation for professional services performed by Arthur S. Wright in the matter of the contest of the will of Jonathan Clark shall be the sum of $250.00 per month together with $75.00 per month and $50.00 per month, respectively, for Mr. Cox and for typewriting, a total of $375.00 per month.

"After the case is set for trial, if any adjournment occurs after the case is prepared for trial, or any delay thereafter in the proceedings occurs, the amount to be paid monthly as above shall be reduced to a sum consistent with all the services performed, if a continuation of such payment each month would amount to a sum greater than a fair compensation therefor; and the case shall be brought to as speedy a trial, as consistent with a proper preparation for trial, and all proceedings expedited so far as proper and consistent with the circumstances.

"This agreement dates from May 1st, 1903, and the sum of $1000 now paid to said Wright for services performed prior to such date.

"The foregoing monthly payments are in full of all demands for any services rendered by said Wright to the heirs of Jonathan Clark, except in the event of a settlement made with the approval of all concerned, or except in the event of a successful issue, whereby the will of Jonathan Clark is permanently set aside, in either of which events the compensation shall be such additional sum as Mr. Shea Smith, Mr. George Clark and Mr. Fred Clark or any two of them shall agree upon.

"Dated Chicago, Illinois, June 17th, 1903."

Mr. Cox, the attorney referred to in this agreement, had theretofore represented George T. Clark as executor and as one of the heirs in the litigation over the will, and at about the time of this agreement Cox was employed by the widow and heirs to assist appellee, and Mr. Nathan G. Moore was selected as the counsel in the proposed litigation. Shortly thereafter appellee and Mr. Cox prepared a bill to set aside the will of Jonathan Clark, which after revision by Mr. Moore was filed.

On December 14, 1903, Alice Clark conveyed to her five children her interest in the estate of Jonathan Clark, creating what is called by counsel the "Alice Clark Trust." The deed was drawn by appellee, and it recited that it was made "for the purpose and with the intent of assisting my children in their litigation in relation to the will or wills of my late husband, Jonathan Clark, in which I am desirous of rendering them such assistance as I am able." An annuity of $5,000 was to be paid to her, and she directs that said trustees shall "pay to such person or persons as to said Trustees, or a majority of them, shall seem proper, such sum or sums of money as may, in their opinion, be necessary and proper for the expenses of the litigation now pending, or which may hereafter be brought concerning or relating to any will or wills, or alleged will of said Jonathan Clark, deceased, in all the courts in which said litigation shall or may be carried on, or other litigation prosecuted by or on behalf of, or against, said estate, for counsel fees, solicitors' fees, attorneys' fees, costs, and expenses of every kind and nature whatsoever, relating to said litigation and the judgment and discretion of said Trustees or a majority of them, as to such payments shall be final and binding upon all parties named herein."

In the litigation and negotiations for settlement which followed appellee took an active part. It is unnecessary to narrate the many moves made thereafter, extending into January, 1909, when the litigation was finally concluded by an agreement entered into by all parties concerned. During the time of the litigation appellee received his compensation of $250 a month and $75 a month for Mr. Cox, under the contract of June 17, 1903. In February, 1909, appellee presented a bill for $50,000 for services in addition to the compensation he had already received. Shea Smith having died on April 1, 1907, Frederick Clark and George Clark, the survivors representing the widow and heirs in the agreement of June 17, 1903, in March, 1909, fixed the additional compensation of appellee at $2,500, which he declined to accept. In November, 1909, appellee filed his bill herein, alleging a contract to pay him $50,000 for his services and claiming an agreement that this should be a lien on the "Fred Clark Trust" and the "Alice Clark Trust." The bill also alleged that the award by Frederick and George Clark was a nullity, fraudulent and void, and prayed that it might be set aside. Alice Clark and all the children of Jonathan Clark, both as individuals and trustees, and George T. Clark, as the administrator of the estate of Eunice M. Smith, were made defendants. In an answer filed the defendants denied the contract to pay appellee the sum of $50,000 as his contingent or additional compensation, and denied the alleged agreement for a lien upon the funds of the "Fred Clark Trust" and the "Alice Clark Trust." Other matters of defense were also set up, including the allowance of $2,500 under the agreement of June 17th; it was also claimed as a bar to any recovery that appellee had wrongfully conducted himself while representing the defendants as their attorney. The incidents of alleged

misconduct are set forth in detail, but as our opinion thereon is not involved in the conclusion we have reached we shall not recite them.

We have concluded to reverse this decree, with instructions to dismiss the bill for want of equity. In our opinion appellee was not entitled to relief in a court of chancery, for one or more reasons.

The rule is that an attorney seeking to recover from a client on a contract drawn by the attorney at the time the relation exists, must show that the client was fully informed of its nature and effect. We quote at some length from Morrison v. Smith, 130 Ill. 304 (316):

> "The relation of attorney and client which existed between the appellants and the appellee has always been regarded as one of special trust and confidence. The law therefore very properly requires that all dealings between an attorney and his client shall be characterized by the utmost fairness and good faith, and it scrutinizes with great closeness all transactions had between them. Mechem on Agency, secs. 877-879. So strict is the rule on this subject, that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, that is to say, the burden is not upon the client to establish fraud and imposition, but the burden rests upon the attorney to show fairness, adequacy and equity. Jennings v. McConnell, 17 Ill. 148. As said by Mr. Weeks: 'The attorney who bargains in a matter of advantage to himself with his client, is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject matter of the transaction, and the nature and effect of the contract, sale, or gift, and was so placed as to be able to deal with his attorney at arm's length.' Weeks on Attorneys and Counselors at Law, sec. 268."

The instruments of May 4, 1903, and December 14, 1903, drawn by appellee for his clients, are silent as to any interest created thereby for appellee's benefit. They contain no suggestion to the widow and heirs that by executing the same they were making a contract with appellee, their attorney. Any lien there might be for any beneficial interest in appellee was in the nature of a secret lien, produced by the act of the

attorney while professing to serve his clients and this will not be tolerated between attorney and client. The rule is very strict even where the language is clear and the name of the attorney appears, but it is inconceivable that an attorney should be permitted to receive such benefits as are here claimed, where the contracts purport exclusively to effect other ends than those pertaining to any beneficial interest in appellee. In the absence of evidence that his clients fully understood and agreed that the contracts were for the purpose claimed by appellee, there was a failure to show that he was entitled to equitable relief.

As there is no competent evidence outside of the instruments themselves tending to show that it was agreed that appellee should have a lien, we must find proof of such a lien in the construction of the instruments. Such construction does not support appellee's claim. As we have indicated, there is no language used in the instruments which purports to create a lien for appellee. His name does not appear, and it is almost beyond possibilities, - certainly probabilities, - that the widow and heirs would put themselves to the trouble and burden of executing formal documents for the purpose of creating liens on their estates for the benefit of all attorneys who might be employed. It is reasonable to assume that attorneys did not need that assurance to induce them to render service; the ample means of the principals was sufficient inducement.

The evident purpose of the agreement concerning the "Fred Clark Trust" was to protect the trustee in paying the expenses of the litigation out of the fund in his hands. It was his authority so to do. The agreement in the "Alice Clark Trust" was made for the manifest purpose of assisting her children in the litigation. It was made some months after the employment of appellee, and we cannot consent to the contention that its purpose was to create a fund upon which attorneys should have

a lien.

Examination of the instruments shows further not only that they did not provide for such liens, but that they contain provisions which are inconsistent with an intention to create them. By the terms of the agreement of June 17th additional compensation was to be allowed appellee on the agreement of Frederick Clark, George Clark and Shea Smith, or any two of them, but no payments could be made out of the "Fred Clark Trust" without the concurrence of all three trustees, nor out of the "Alice Clark Trust" without the concurrence of three out of five trustees. It does not follow that because two of the parties to the agreement of June 17th might agree as to the amount of additional fees that this must be paid out of either trust fund, for under the terms of the instruments creating these trusts something else must happen, wholly independent of the contract of June 17th, namely, the concurrence of three trustees under the "Fred Clark Trust" and a majority under the "Alice Clark Trust." We do not understand how the court could order payment out of these trust funds, contrary to the plainly expressed conditions fixed by the creators of these trusts that no payments should be made without the consent of a certain number of trustees. Such an order of payment could follow only by construing into these instruments something not contained therein, and construing out of them something which is clearly and unequivocally contained therein.

The cases cited by appellee that equitable liens may be created in favor of a person or persons although not named, are not in point, for, speaking generally, those are cases where by express terms or clear implications a trust fund or security was created for the benefit of a certain class of persons. This is not the situation in the case before us,

where, as we have said, the creation by these instruments of a fund or security for the benefit of attorneys was foreign to their intent and terms.

It is also claimed as ground for equitable relief that the agreement of June 17th for additional compensation is an agreement to arbitrate the amount, and that by the death of Shea Smith, one of the arbitrators, this agreement became a nullity, and that therefore the action of the two surviving arbitrators in attempting to fix the amount of appellee's award is void. Assuming this to be the correct theory of the nature of the agreement, it follows as a matter of law that the death of one arbitrator nullifies the agreement to arbitrate and there was no ground for a court of equity to assume jurisdiction; there is nothing calling for the exercise of any chancery powers. If the award is void for the reasons stated, this is available in law. The rule is stated in 3 Cyc. 754, referring to arbitration and award:

> "The general rule that the existence of an adequate remedy will prevent the invoking of equitable jurisdiction is applied here, and if the objections are such as may be pleaded at law or are such as would defeat the enforcement of the award whenever it should be set up against a party - as where the invalidity of the award appears upon its face, or goes to the jurisdiction to show no award - equity will not interfere."

To the same effect are Hubbard v. Hubbard, 61 Ill. 228; North Braddock Borough v. Corey, 54 Atl. (Pa.) 486; Person v. Drew, 19 Wis. 241. In Gardner v. Masters, 56 N. C. 462, it was claimed that the submission to arbitration was revoked, and the court said: "We will not enter upon this subject, because if it be true in fact the plaintiffs may avail themselves of it at law." We should not be understood as holding that the agreement for additional compensation was a submission to arbitration. We have simply considered appellee's theory of its character, without intending to imply assent thereto.

Many other points are presented in elaborate and thorough briefs by all counsel concerned, but in view of the conclusion we have reached any comment on these points would be superfluous and merely dicta.

Holding as we do, that appellee had no right to relief in a court of chancery, the decree is reversed and the cause remanded with instructions to dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

March Term, 1913, No.

288 - 19272.

E. C. ATKINS & COMPANY, a Corporation,
Appellee,

vs.

JAMES G. KIRK, doing business as J. G. KIRK & CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

187 I.A. 310

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This action was brought to recover an amount paid by the plaintiff as rent, for which the plaintiff was primarily liable, but which, it was alleged, the defendant had assumed and agreed to pay. The defense was, in substance, that while the defendant had made an offer to the plaintiff, yet such offer was withdrawn before any notice of its acceptance was communicated to the defendant. Upon a trial before the court without a jury, the plaintiff had judgment, from which the defendant appeals.

The record shows the following facts: In October, 1909, the plaintiff, an Indiana corporation having its principal office in Indianapolis, occupied the second floor of a building on Market street, in Chicago, under a lease expiring April 30, 1918. Defendant, a renting agent, had charge of certain premises on Lake street, which he desired to rent to the plaintiff. After some negotiation, the precise nature of which is not disclosed by the evidence, the defendant, on October 9, 1909, prepared and submitted to one Sanford, the plaintiff's agent in Chicago, a lease of the Lake street premises, and with it submitted a letter addressed to the plaintiff, stating that "In consideration of your closing a lease on the store at [illegible] East Lake Street, this city, with this firm, we are willing to enter into the following

agreements as regards the floor which you now occupy at 75-77 Market Street, same being a second floor, we hereby agree that in the event said floor is not rented from May first, 1910, we will assume said lease from that date, lease running for two years from May 1st, 1910, rental at the rate of $1500.00 per year." The letter further stated that "it is understood" that defendant should have the exclusive renting of the Market street premises; that "all inquiries on said space" should be turned over to him; that he should receive a commission of five per cent. of the first year's rental, and if rented prior to May 1st, 1910, he should receive, in addition thereto, one-third of any rent that might be secured prior to that date; and that the plaintiff should "clean walls and ceiling and put plumbing in condition if necessary" when it vacated the premises. Sanford forwarded this letter and lease to the principal office of the plaintiff in Indianapolis, and on October 10, 1909, the plaintiff wrote the defendant as follows: "We have mailed lease properly signed up for the storeroom at No. 28 Lake Street, which no doubt will be delivered this morning." On October 26, 1909, the board of directors of the plaintiff formally voted to approve the lease and to accept the defendant's offer to assure the lease of the Market street premises. No direct notice of this action was given to the defendant, but the Lake street lease was signed and delivered, the defendant collected his commission for negotiating the same, the plaintiff removed from Market street to the Lake street premises, and the defendant placed his "For Rent" signs upon the vacated premises. After such removal, the plaintiff referred all inquiries as to the Market street property to the defendant. No tenant for that property was secured, however, at any time, and the plaintiff was obliged to, and did, pay all the rent for the same to the end of the term of its lease.

Copies of two letters were offered in evidence, which the defendant claims to have written and mailed to the plaintiff at its Market street address, while the renewal was going on. Plaintiff claims it never received either of them. The first of these letters was dated October 27, 1909, and states: "We have not as yet received an answer to our proposition made to you, as regards second floor at 75-77 Market Street. Same should be returned with your signature attached. If this proposition is not returned to us, signed by your Firm, we wish to notify you that we shall consider same null and void, provided it is not mailed before November first, 1909." The second letter was dated November 3, 1909, and states: "Inasmuch as we have not received our contract as regards our assuming the lease on your second floor at 75-7 Market Street, with your signature attached, we wish to notify you that we will not consider ourselves liable for same." These two letters constitute the sole basis for defendant's claim that his offer was withdrawn before it was accepted by the plaintiff. The Lake street lease, however, had been executed and delivered, to the knowledge of defendant, prior to the date of the first of these letters.

On May 16, 1910, the plaintiff wrote to the defendant, enclosing a bill which it had received for water tax upon the Market street premises from May 1 to November 1, 1910, and requesting defendant to "Kindly send us a check covering same, as in our agreement with you, you were to assume our lease at 475 Market Street after May 1st." To this letter, the defendant replied: "There is some mistake in this, as you did not accept our proposition as regards the lease on the second floor at 75 Market Street." An agent of the plaintiff testified that he then went over to see the defendant "about his repudiating that contract;" that defendant said the Market street premises were not in a tenantable condition and "suggested that we have it done

at once," which was done.

Though the contentions of the defendant are stated in several ways, all but one of them are based upon the proposition that the defendant's letter of October 9, 1909, was a mere offer on his part, which had no binding force or effect unless the plaintiff not only accepted the same, but also gave notice of such acceptance to the defendant before the offer was withdrawn. It is insisted that no notice of the acceptance of such offer was communicated to the defendant prior to May 18, 1910, and that the notice then given was ineffectual, because the offer had been withdrawn by the letters of October 27 and November 3, 1909. In cases of this character, the rule recognized by the authorities is that where it is apparent that the offer as made contemplates a formal written acceptance as a condition precedent, then no contract is made until that is done. (Scott v. Fowler, 227 Ill. 104.) But unless the offer requires such a formal assent to its terms, an acceptance may be implied or inferred from the conduct of the person to whom the offer is made. (Anglo-Am. Prov. Co. v. Prentiss, 167 Ill. 508.) In such case, proof that the act required to be done has been performed, or that its performance has been commenced in the manner prescribed by the terms of the offer, is ordinarily sufficient evidence of the acceptance of the offer. (Perkins v. Hadsell, 50 Ill. 216; Mix v. Baldwin, 79 Ill. 215; Plumb v. Campbell, 129 Ill. 101; Anglo-American Prov. Co. v. Prentiss, supra; Vogal v. Pelee, 157 Ill. 338.) Of course, the mere mental intention of a party to accept such an offer is not sufficient. It is essential that such intention be either directly communicated to the party making the offer, or be expressed by the doing of some overt act contemplated by the terms of the offer, in such a way that notice will be presumed. Clark v. Potts, 256 Ill. 195, 198.

In this case the offer of the defendant did not, in terms, require any formal written acceptance on the part of the plaintiff. On the contrary, the terms of the offer were that "In consideration of your closing a lease on the store at 29 East Lake Street, this city, with this firm, * * * we hereby agree, etc." When, therefore, the plaintiff executed the lease submitted by the defendant, and gave notice, by letter, that it had done so, the condition of the offer was complied with according to its terms. By so doing, the plaintiff clearly indicated to the defendant its acceptance of his offer, and gave notice to him that it had already complied with the essential condition of the offer. After the offer of the defendant had been thus accepted and the defendant had received the stipulated consideration for his promise to assume the lease of the vacated premises, he could not thereafter revoke his offer. The attempted revocation by the defendant's letter of November 5, 1909, was therefore of no effect whatever. Sanford being dead, the alleged conversations with him were clearly inadmissible. (Doggett v. Greene, 254 Ill. 134.)

It is claimed that when the offer was made, the words "We hereby accept the above proposition" and a line for a signature were typewritten under the signature of defendant, indicating that a formal written acceptance was expected by the defendant. There is nothing in the record to show by whom those words were written. But if they were written by the defendant, we think that the "closing" of the lease upon the Lake street premises and the letter stating that the lease had been signed, were equivalent to a formal written acceptance. (Vogel v. Pekoc, supra.)

It is also claimed that the evidence shows that the Market street premises were not placed in a tenantable condition when the plaintiff vacated the premises. The words "tenantable condition" as used in the offer are followed by the explanatory

words: "viz: clean walls and ceiling, and put plumbing in condition if necessary." There was some evidence from which the trial court could reasonably have found that no such work was in fact necessary. The work was done, in any event, as soon as defendant requested it to be done, and there was no proof that defendant sustained any damage by reason of this slight departure from the terms of the contract, if there was any such departure. If the work was necessary and was not done exactly at the time stated in the offer, that fact would not be sufficient, of itself, to exempt the defendant from all liability.

After a careful consideration of the alleged errors assigned and the arguments of counsel thereon, we find no substantial error in the record of which the appellant can complain. The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

March Term, 1913, M.

1127

286 - 10295.

ANNA J. S. HARMON,
Appellee,

vs.

A. P. CALLAHAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

187 I.A. 312

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The plaintiff (appellee) leased a house on Lake avenue, Chicago, to Mrs. Mary Foley for three years from May 1, 1910. The defendant (appellant) in writing guaranteed the payment of the rent, and the performance of all covenants of the lessee. Mrs. Foley occupied the premises from May 1, 1910, until the middle of March, 1911, when she moved out, having paid the rent up to that time. The plaintiff notified the guarantor and requested his co-operation in securing another tenant for the unexpired term and in making suitable repairs for that purpose, but he declined to do anything unless he was released from his guaranty. Plaintiff then employed two renting agents to find a tenant and arranged with the janitor of an adjoining building to look after the property while it was unoccupied. A fire occurred on April 18, 1910, causing the destruction of a stained glass window and other damage. In our opinion, the preponderance of the evidence shows that the damage caused by the fire was repaired within thirty days. In September, 1911, a lady named Seed offered to take a lease of the house, provided she were allowed to make sundry repairs and deduct the cost of the same from the rent. This proposition was communicated to the guarantor, who at first expressed a willingness to "co-operate in any reasonable way" but afterwards refused to do or consent to anything in the absence of his attorney, who was out of the city; whereupon

the house was let to Miss Reed under the condition mentioned. No rent, as such, was paid by anyone for the period beginning April 1, 1911, and ending January 31, 1912. This suit was brought to recover the rent for that period, and upon a trial before a jury, a verdict was returned in favor of the lessor. From a judgment entered on that verdict, the guarantor appealed.

The lease to Mrs. Foley contained the usual clause providing for re-entry upon default in the terms of the lease, and also a clause (the seventh) to the effect that if the lessee should abandon or vacate the premises, the same should be re-let by the lessor for such rent and upon such terms as the lessor might see fit, and if a sufficient sum should not be thus realized, after paying the expenses of such re-letting and collecting, to satisfy the rent reserved in the lease, the lessee "agrees to satisfy and pay all deficiency." There was a further clause providing that "In case said premises shall be rendered untenantable by fire or other casualty, the lessor may, at his option, terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine." The defenses urged upon the trial were, first, that the lessor took possession of the vacated premises under the re-entry clause and not under the seventh clause of the lease; and second, that the premises were not repaired within thirty days after the fire occurred. Other grounds of defense were set up in the affidavit of merits, but they seem to have been abandoned, and are not urged in this court. The contentions here made are that the instructions of the trial court were inaccurate, misleading, and ignored the defenses interposed, and that the court erred in admitting certain evidence.

The instructions were given orally. As transcribed into the record, the oral charge is divided into paragraphs,

without numbers or other marks upon them. For the purpose of criticism and objection, defendant's counsel treats each of these paragraphs as a separate and distinct instruction. This practice is wholly unwarranted, Where, as in this case, the instructions are given orally and are given as a continuous and connected charge to the jury. Greenburg v. Childs & Co., 242 Ill. 110. Counsel followed the same practice in making his objections in the trial court. From the objections there made, it appears that he objected to the giving of each of the first five paragraphs. When the whole charge is read together, and not separated in this manner, we do not think the portion objected to contains any serious prejudicial error. While some sentences in this part of the charge are open to criticism, the charge as a whole states, with substantial accuracy and fairness, the legal principles applicable to the facts shown by the evidence. The most serious objection is to that sentence which states that "the burden of proof is on the defendant, to show by a preponderance of the evidence that he is not liable." Standing alone, this sentence is not only misleading, but erroneous. But when the sentence preceding it, and the sentence following it, are read in connection with it, the meaning evidently intended to be conveyed, and which a jury of average intelligence would undoubtedly understand, is that the burden is upon the defendant to show by a preponderance of the evidence that he was discharged from liability upon his (admitted) guarantee, in the manner claimed by him in his affidavit of merits or affidavit of defense. The words "burden of proof" are frequently used in this sense. (Chicago Union Traction Co. v. Mee, 218 Ill. 9.) This view is supported by the fact that in a later paragraph of the charge the jury were told that "the burden of proof is on the plaintiff to prove her case by

a preponderance of the evidence."

It was also objected that the court failed to instruct the jury as to the first claim made by the affidavit of merits, viz: that the lessor re-entered and took possession of the vacated premises under the re-entry clause of the lease, and not under the re-letting clause thereof. We have searched the record in vain for any evidence tending to prove this claim of the defendant. We do not think that, under the evidence, there was any such "issue" to be submitted to the jury, and hence no error was committed in ignoring it.

It is urged that it was error to permit the witness Harmon to testify that he re-rented the premises to Miss Seed under the seventh clause of the lease. The question which brought out this answer was put by the court, and the abstract does not show that any objection was made at the time to the court's question, nor that any motion was made to strike out the answer. Hence the point was not properly saved for review in this court. While formal exceptions are unnecessary in trials in the Municipal court, yet it must appear that a ruling was "made against the objection of the party complaining thereof," before the ruling can be assailed in this court. (Municipal Court Act, Sec. 25, Par.8.)

It is also insisted that the court erred in permitting several of the witnesses to state that, in their opinion, the premises were in a "tenantable condition" at the time of the fire and after the repairs were made. The facts regarding the condition of the premises at such times were fully shown aside from these opinions, and while it may be conceded that the opinions given on that subject were inadmissible, we cannot see how appellant was injured in any way, and therefore hold that under the facts of this case, the error in this respect was harmless.

The judgment will be affirmed.

AFFIRMED.

March Term, 1913, No.
291 - 19298.

187 I.A. 314

JAMES ROGERS, Appellee,	)	APPEAL FROM
vs.	)	COUNTY COURT
WILLIAM H. WELLER, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE PITCH

DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellant in the County Court of Cook County, in an action of debt, based upon section 2 of the Act of 1895, relating to the sale of property under a power of sale contained in a chattel mortgage (Hurd's Stat., Chap. 95, par. 28.) That section provides that when property is thus sold, the mortgagee shall make out an itemized statement of the property sold, giving the name of each purchaser and the amount for which each article was sold, and an itemized statement of the expenses connected with the sale, "and shall deliver the same to the mortgagor, or some one of them in person or by mail, and if he fails so to do within ten days after said sale, the owner of said property may sue for and recover one-third of the value of the property so sold from the mortgagee." It appears from the evidence that a sale of that character was made by appellant under a power of sale contained in a chattel mortgage from appellee and one Hill to appellant. It was admitted that the sale was regularly made, but it was claimed that no such itemized statement as the statute requires was ever "delivered" to appellee either "in person or by mail." The jury returned a verdict finding the value of the property sold to be $1950, and assessed the plaintiff's damages at one-third thereof, or $650.

Appellant urges as grounds for reversal that the verdict is a compromise and that one of the instructions given to the jury was erroneous. As to the first point, there is no evidence that the verdict was the result of any agreement among the jurors to reach a verdict by compromise. The amount of the verdict is within the range of the testimony of the witnesses as to value and is supported by some of such testimony. Appellant claims that the basis of value should have been the value at the date of the seizure and not the value upon the date of the sale. The property was sold five days after it was seized. It was shown that it was in substantially the same condition at the time of the sale as when it was seized, and there is no evidence that the value was changed during the intervening five days. Hence, appellant suffered no injury, even if his contention is correct. We think, however, the contention is unsound, as the statute seems to require the value to be fixed as of the date of the sale.

The objections to the instruction are, in our opinion, without merit. The portion of the instruction objected to is substantially in the language of the statute. Furthermore, if the use of the words "deliver the same to the mortgagor, or some one or other of them, in person or by mail" is misleading, appellant cannot be heard to complain, for he himself offered an instruction containing the same language. We do not think that the instruction assumes the existence of material facts.

The attempt on the part of appellant to show that an itemized statement had in fact been "delivered by mail" to appellee was clearly insufficient, as the witness testified that he could not say when he mailed the letter containing such statement, nor to whom the letter was addressed. It was admitted that it was not mailed to appellee.

The judgment of the County Court will be affirmed.

AFFIRMED.

March Term, 1913, No.

314 - 19325.

JOSEPH BIENIAS, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
JOHN BRUCKER, HENRY BRUCKER, Appellants.	)	COOK COUNTY.

187 I.A. 315

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for $2000 for personal injuries sustained through the alleged negligence of appellants.

In July, 1910, appellants operated a stove repair foundry and appellee was, and had been for eighteen months, in their employ as a "chipper" of castings. In doing this work, appellee used what is called an emery-wheel machine, which consisted of a stand supporting a horizontal shaft, at each end of which was an emery wheel about two feet in diameter, the shaft being revolved by means of a vertical belt running over a pulley seven inches in diameter, located on the shaft between the two emery wheels. The portion of the belt nearest to him, as he faced the machine, ran upward from the pulley. The ends of this belt were laced together with a leather cord. There were four belts between the motor and appellee's machine. The belt connecting the motor with the main shaft was ten or twelve inches wide. The others were smaller.

It seems that at times it became necessary to "dress", or grease these belts with graphite to prevent them from slipping. That material is prepared for use in round "sticks", ten inches long and one inch in diameter. The operation of dressing a belt is performed by pressing one end of a piece of such a "stick" against the inner side of the belt while the belt is in

1871.M.315

motion; and the safe way to do this is to press the "stick" of grease against the inner side of that part of the belt which is traveling away from the pulley, so that the hand of the operator may not be drawn by the moving belt into or against the pulley.

On the morning of the day before the accident, the appellee's foreman told him to "grease the belts." Appellee testified that he had never done this work prior to that time. Several other witnesses testified to the contrary. Appellee testified that he did not grease the belts that day, because he "didn't have time." There is no evidence that he objected to the order of the foreman at any time or for any reason. The next day, just before noon, the main belt slipped off its pulley, and the foreman, in going out to lunch, said to him: "Why didn't you grease the belt, so that it would not fall off?" Appellee replied: "I haven't got anything to grease it with." The foreman then told him to "go to the storeroom and get some of the grease and dress the belt." Appellee put the belt back on the pulley and went out to lunch. When he returned, he went to the storeroom, and a machinist there gave him a piece of graphite an inch and a half long. Thereupon appellee started the machine and began to "dress" the belts. He testified that the foreman gave him no other instructions, and that "no one showed me how to do it." He first dressed the main belt. This belt ran up and down in a manner similar to the one on the emery-wheel machine. Appellee took the piece of grease in his hand and pressed it against the inner side of that part of the moving belt which was going upward, moving the grease back and forth across the surface of the belt for about five minutes. He testified that this belt was fastened together with rivets, presenting an even, smooth surface, but that when he held the grease

"tight" against the belt, "it jerked my hand up." Appellee then, in a similar manner, dressed another belt, which ran horizontally. He did this by pressing the stick of grease down on the inner surface of that part of the belt which ran towards the motor. When asked whether he "held the grease down tight" on this belt, he replied: "Not very tight, because it would have taken my hand towards the pulley." When he had finished dressing the second belt, he proceeded to dress the belt on the emery-wheel machine. Instead of pressing the "stick" against the inner surface of that part of the belt which was nearest to him and was moving upward and away from the pulley, he reached across about a foot and a half above the pulley and pressed the stick of grease against the part of the belt which was furthest from him and was moving downward towards the pulley. As he did this, the piece of grease in his hand was caught by the laced portion of the belt and his arm was jerked down and caught between the pulley and the belt, resulting in a fracture of the bones of his left forearm.

The declaration alleges that it was the duty of defendants to exercise ordinary care to furnish the plaintiff with reasonably safe machinery and appliances with which to work, and not to order him to perform dangerous work without warning him of the dangers thereof; that, not regarding their said duty, defendants negligently furnished him a bar of grease that was "improper for use and defective, in that the same was worn out, too short, and liable to adhere to said belt when the same was applied to said belt in motion," and negligently ordered plaintiff to use and apply the same to the belt while in motion, "of the dangers of which the defendants had notice, but of which the plaintiff did not have notice;" and that while the plaintiff, in the exercise of due care, and "in pursuance to said order, relying thereon," was using the bar of grease on the

moving belt, "the same stuck and adhered thereto," and his hand and arm were caught and injured.

It is very clear from the evidence that there was nothing defective or unsafe in any of the machinery or appliances furnished by appellants for the use of appellee. There is no evidence tending to prove that the bar of grease furnished to appellee was "worn out, too short and liable to adhere" to the belt, or that "the same stuck and adhered thereto." It is clear that whatever danger was involved in doing what appellee was told to do, was not only plainly apparent to any person of ordinary intelligence, but was fully known to appellee. His own evidence shows that he knew that if he applied the grease to the inner side of that part of the belt that was moving toward the pulley at any point within arm's length of the pulley, there was danger that his hand would be caught and injured. The order or direction of the foreman was a general one - to "grease the belts." Appellee knew how this was done, and how it could be safely done. He chose a different method, for no apparent reason. Whatever danger there was, he created by the manner in which he performed the task.

In I. C. R.R. Co. v. Swift, 213 Ill. 307, 313, it is said: "Where the servant is specifically directed by his superior to do the work in a dangerous manner, and injury results, he may recover, unless, indeed, the danger was so imminent that a reasonably prudent man would not have incurred it. * * * Where, however, the employee is not directed to do the work in a specific manner, but is given a general order to perform the task and is himself left to use his own discretion as to the manner in which the work shall be done, and there exists a safe way and a dangerous way, which are equally open to him, if he selects the unsafe method through heedlessness or because it involves less exertion on his part, and injury to his person results, he

cannot recover."

Under the allegations of the declaration relating to the alleged negligent order it was incumbent upon appellee, in order to overcome the objection of assumed risk, to show that he did not know, and was not chargeable with notice of, the danger involved in complying with the order of the foreman, and that he relied upon such order as an assurance that the work might be safely performed. In Republic Iron & Steel Co. v. Lee, 227 Ill. 248, 258, it is said: "An exception to the doctrine of assumed risk exists where a servant is ordered by his master to do certain work which is attended with danger of which he is not fully cognizant, and he relies upon the order to do the work as an assurance that he may safely perform the task." In the same case, however, it was held that this exception does not apply where the injured employee has full and complete knowledge of all the dangers attendant upon a compliance with the alleged negligent order. "It is only where the servant has been misled by the order of the master that the exception exists." (Ibid. p. 258.) There is no evidence in this case tending to prove that appellee did not have full notice of all the dangers attendant upon the work of greasing the belts, or that he was misled in any way by the order of the foreman. There was nothing peremptory in the order or direction of the foreman. He had ample time for reflection and full opportunity to know and appreciate the danger, and to exercise such care for his own safety as a reasonably prudent man would have exercised under the same circumstances. We are unable to escape the conclusion that the evidence wholly fails to show any negligence on the part of defendants and that it clearly shows, not only that the appellee assumed the risk of injury, but that his injury was due to his own want of reasonable care.

For the reasons stated, the judgment of the Superior Court will be reversed without remanding.

JUDGMENT REVERSED.

Finding of facts to be incorporated in the judgment: The court finds from the evidence that defendants were not guilty of the negligence charged in the plaintiff's declaration; that the plaintiff, at the time he was injured, was not in the exercise of ordinary care for his own safety; that his failure to use such care proximately contributed to his injury; and that he had full and complete knowledge of the danger attendant upon the task to which he was assigned, and assumed the risk of injury therefrom.

March Term, 1913, No.

326 - 19339.

MARIE L. RICE, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
WARNER HOTEL COMPANY, a Corporation, Appellant.	)	COOK COUNTY.

187 I.A. 317

MR. PRESIDING JUSTICE PITCH

DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff recovered a judgment for $4500 for injuries alleged to have been sustained through the defendant's negligence in failing to use reasonable care to keep a window in a reasonably safe condition. It is urged, with earnestness and force, that the evidence of the plaintiff as to the manner in which the accident occurred is highly improbable. As, however, we have reached the conclusion that the judgment must be reversed because of the errors hereafter noted, we refrain from expressing any opinion as to the weight of the evidence further than to say that, in our opinion, the plaintiff's case is not so clear upon the facts that we would feel justified in holding that the errors committed were not prejudicial to the defendant.

During the examination of the jury, plaintiff's counsel asked the first juror, who was a salesman, the following question: "Do you know anyone connected with the Aetna Insurance Company?" Three other jurors were asked: "Do you carry casualty insurance?", or a similar question. These questions were objected to as indicating and suggesting to the jury that the defendant was insured against liability by the Aetna Insurance Company and that the defense was being conducted by it. The court sustained the objections, but when defendant's counsel moved to withdraw a juror and continue the case on the ground that the error was not

cured merely by sustaining the objections, the motion was overruled and an exception taken.

In Kenny v. Marquette Cement Co., 243 Ill. 384, 404, it was said: "While the jury were being impaneled appellee was permitted to ask certain jurymen, 'Are you acquainted with any of the officers or agents of the Aetna Insurance Company?' This question was improper, and the objection to it should have been sustained by the trial court. (Eldorado Coal Co. v. Swan, 227 Ill. 506; McCarthy v. Spring Valley Coal Co., 232 id. 476.) We do not think, however, taking into consideration the entire record, that reversible error was committed in permitting this question to be asked."

In Eldorado Coal Co. v. Swan, supra, it was urged that the judgment be reversed because appellee's counsel asked questions of certain witnesses implying that an insurance company was defending the suit; and though objections to the questions were promptly sustained by the trial court, the Supreme Court said (p. 504): "The conduct of counsel in thus seeking to place before the jury matters not involved in the issue is censurable in the highest degree, and if the amount of the verdict were such as to raise a suspicion in our minds that the jury had been influenced by this misconduct, or if the case were a close one on the facts, we would not hesitate to reverse the judgment for this reason alone. But since the verdict was rather below the usual amount awarded where the injury has been sustained such as the evidence shows here, and the case is reasonably clear on the facts, there is no reason to suspect that the jury were actuated by prejudice or passion."

In Aetitus v. Spring Valley Coal Co., 245 Ill. 32, a similar question arose. It was there said (p. 34): "The attorney for defendant in error inquired of two of the jurors, on their voir dire, if they were interested in any casualty company which insured employers of labor against damages for injuries to employees. The court sustained an objection to that course of ex-

amination. Such examination, if made for the purpose of enabling counsel to exercise their right of peremptory challenge, was held in Iroquois Furnace Co. v. McCrea, 191 Ill. 340, to be proper. The trial court sustained an objection to the examination, and doubtless was of the opinion, from the character of the examination and the persons who were being interrogated, that the questions were not asked for the purpose of exercising the right of peremptory challenge of said jurors, but that the examination, under the authority of McCarthy v. Spring Valley Coal Co., 232 Ill. 473, was improper. As the amount of the verdict is not large considering the defendant in error's injuries, and as the objection to the examination was promptly sustained by the trial court, we think, although the examination may have been for an improper purpose, its effect was not prejudicial and that the judgment of the trial court should not be reversed by reason of such examination. In a case, however, where the verdict is large and it is not apparent the examination was for the purpose of exercising the right of peremptory challenge, under the authority of the McCarthy case we should not hesitate to reverse a judgment where the fact that the defendant, an employer of labor, was insured by a casualty company against damages for injuries to his employees had been improperly brought before the jurors during their voir dire." (Italics ours.)

In the latest case upon this subject, Mithen v. Jeffery, 259 Ill. 372, the following questions were put and answers followed: "Do you know Mr. Jackson?" - "No." "Mr. Snow, here?" "No." "The Travelers Insurance Company?" - o answer. As to these questions the court said (p. 378): "The purpose of an attorney in making such inquiries as were allowed in this case is to inform the jury that a defendant is insured, and such an examination is improper," citing the Swan, McCarthy and Aetitus cases above mentioned. In the same case it is also said: "It is the

right of an attorney to ascertain whether a juror has any interest in or relation to claims or suits of the same character as the one being tried, for the purpose of exercising the right of peremptory challenge, (Iroquois Furnace Co. v. McCrea, 191 Ill. 340) but that can be readily done by an examination which would not lead the jury to understand that the defendant is insured against liability and is without substantial interest in the question of damages."

Upon the authority of these cases, we are constrained to hold that the questions propounded to the jury in this case were not only improper, but that the motion to withdraw a juror and continue the case should have been granted, or the jury should have been dismissed and an entirely new panel called. The fact that the trial court sustained objections to the questions indicates that the court did not consider the examination as made for the purpose of enabling counsel to exercise the right of peremptory challenge. This was the view taken by the Supreme Court in Mithen v. Jeffery, supra, as to the purpose of asking such questions. Under the facts of this case, we are unable to say that the effect was not prejudicial. Merely sustaining the objections to the questions did not remove the real ground of objection. The harm was done when the improper questions were asked, and the error could only have been cured by dismissing the entire panel of jurors.

We are also of the opinion that it was reversible error for the court to permit so-called "experts" to testify as to the effect upon a window pane of permitting the glass to become loose. Such opinions were clearly inadmissible. The matters inquired about were matters of common knowledge and not the subject of expert testimony. In view of the fact that the plaintiff's case rested almost wholly upon her own evidence, the effect of the so-called expert testimony was to give undue weight to her evidence

by the apparent support of disinterested witnesses of high character, who in reality, knew nothing of the facts in the case. For the errors indicated, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

arch Term, 1914. No.

7 - 18598.

LOUIS L. LETTIERE,
Defendant in Error,

vs.

N. L. BLACKMAN and
LEONARD J. WILLIAMS.

N. L. BLACKMAN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

187 I.A. 336

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Louis L. Lettiere, plaintiff, commenced an action of the fourth class in the Municipal Court of Chicago to recover the sum of $95 from N. L. Blackman and Leonard J. Williams, defendants below, for commissions on the sale of certain real estate, which sum, as alleged in the statement of claim, "defendants agreed to apply on the purchase price of 4 lots in Clarkdale, which lots plaintiff agreed to buy, but which defendants on request refused to transfer to plaintiff, after tender to defendants of the balance of the purchase price. Blackman alone was served with summons and he entered his appearance. The summons was returned "not found" as to Williams. The nature of Blackman's defense was, as disclosed from his affidavit of merits, that he was not jointly liable with Williams to plaintiff in any sum whatsoever, and that plaintiff was not entitled to recover any commissions from either of the defendants. The cause was tried before the court without a jury, resulting in a finding of the issues against Blackman and the assessment of plaintiff's damages at the sum of $95. A motion for a new trial was overruled, and judgment was rendered against Blackman for $95 and costs, which judgment he seeks by this writ of error to reverse. No appearance or brief has been filed by the plaintiff below in this court.

side court.

From the "statement of facts" signed by the trial judge we find the following: In June, 1909, Blackman entered into a partnership with Williams in the real estate business at No. 3705 Wentworth avenue, Chicago. In June 1910, Blackman caused notices to be published in two newspapers published in Chicago to the effect that said partnership theretofore existing under the firm name of Williams & Blackman had been dissolved, but that Williams would continue the business at the same place "under the name of Williams & Blackman". Prior to the publication of said notices plaintiff had had no business dealings with said firm. Some time in December 1910, plaintiff had a conversation with Williams at said place of business. At that time the name shown on the premises where said business was being conducted was that of "Williams & Blackman". Williams told plaintiff that if plaintiff could find a buyer for certain premises at No. 3750 LaSalle street, Chicago, he (Williams) would allow plaintiff a commission of $40 to be applied on any real estate plaintiff might afterwards purchase. Plaintiff found a purchaser and said premises on LaSalle street was transferred to said purchaser. About this time Williams also told plaintiff that he would pay plaintiff a commission of $5 on each lot in "Clarkdale" that plaintiff could find a purchaser for, said commission to be applied on any real estate plaintiff might purchase. On January 28, 1911, Williams gave plaintiff the following paper:

"Buy and Sell Chicago Real Estate at
Private or Judicial Sale.
Estates Managed, Rents Collected,
Loans Made, Insurance Placed.
Builders and Contractors,
Painters and Decorators.
Williams & Blackman
Tel. Yards 5134. 3705 Wentworth Ave.
Chicago, Ill., Jan. 28, 1911.

This is to certify that Lewis Lettiere has a commission of $40.00 due him from the sale of 3750 La Salle St. to be applied on anything he may buy from us.

Leonard J. Williams."

During the month of February 1911, Williams delivered to plaintiff a certain written contract signed by Blackman and plaintiff, dated February 8, 1911, by the terms of which plaintiff agreed to purchase at the price of $160 four lots therein described in "Clarkdale" and Blackman agreed to sell the same at said price, and to convey "or cause to be conveyed" the same to plaintiff. The contract further provided that plaintiff had paid the sum of $40, as earnest money, to be applied on the purchase when consummated, which earnest money was to be held by "Williams & Blackman for the mutual benefit of the parties concerned." This sum of $40 was the sum which Williams had agreed plaintiff was to receive in the manner above mentioned as his commissions on said sale of said LaSalle street premises. By the terms of said contract, also, plaintiff agreed to pay, within five days after the title to said lots had been accepted by him, the further sum of $120 "at the office of Williams & Blackman", provided a warranty deed conveying said four lots to plaintiff should then be ready for delivery. Blackman testified that said contract was brought to him for his signature by Williams, and that he did not know plaintiff until July 1911, when plaintiff came to his office and made the tender hereinafter mentioned and demanded a deed for said four lots. One Gildersleeve was the owner of the "Clarkdale" lots. Blackman testified that he had an interest therein by reason of an agreement with Gildersleeve.

Subsequently to the delivery of said contract and during February 1911, plaintiff consummated sales of 11 other Clarkdale lots to three different parties. Two of these parties each testified that the sales were made through plaintiff by Williams at the Wentworth avenue office, where part of the purchase price was paid to Williams, and that subsequently the final payment was made to Gildersleeve, at his office, and the deeds there delivered by

him. In the spring or summer of 1911, Williams left Chicago and "disappeared". Gildersleeve testified that he never received the part of the consideration paid to Williams on the sales of said 11 Clarkdale lots, that Williams "disappeared with the money", and that he (Gildersleeve) and Blackman "divided the loss on these different lots for the money which Williams had received."

In July 1911, plaintiff called on Blackman and tendered him the sum of $45 and demanded a deed for said 4 Clarkdale lots. At that time he claimed credit, on the total purchase price of $160, for the $40 mentioned in said contract for commissions on the sale of said LaSalle street property, and for $55 as commissions for the sales of said 11 Clarkdale lots (at $5 per lot as agreed by Williams), and $20 as commissions on the said 4 lots which he had agreed to buy. Blackman refused the tender and refused to give plaintiff a deed, "claiming a balance of $120 in cash." On the trial plaintiff did not claim the $20 on said 4 lots as the sale was never completed, but did claim the sum of $95 for selling the LaSalle street property and the said 11 Clarkdale lots, no part of which sum had been paid him.

We cannot say that the finding and judgment are contrary to the evidence and against the law, as contended by counsel for defendant. While Blackman testified that in June 1910 he and Williams "agreed to dissolve" the partnership and he caused the notices of dissolution above mentioned to be published, it does not appear that the partnership was then in fact dissolved. And, in our opinion, the acts of Blackman subsequent to December 1910, as disclosed by this record, were such as would render him liable to plaintiff as a partner with Williams, even though it was the intention of both partners in June 1910 that Blackman should retire as a member of the firm and the business be continued by

Williams alone under the firm name. (50 Cyc. 677; Fisher v. Bowles, 20 Ill. 398; Ellis' Administrators v. Bronson, 40 Ill. 485, 487; Chicago T. & S. Bank, v. Kinnare, 174 Ill. 358, 362; Wilson v. Roelofs, 88 Ill. App. 480, 483.)

Counsel further contends that the tender of $45 by plaintiff to Blackman at the time the former demanded of the latter a deed to the said 4 Clarkdale lots was insufficient, because, as counsel argues, a broker selling land on commission cannot claim commission where he becomes the purchaser himself. A sufficient answer to this contention is that Blackman did not refuse the tender on this ground. He in effect refused to give plaintiff a deed to said lots unless $120 in cash was paid him, and the evidence clearly shows that plaintiff was entitled to a credit on said $120 of the sum of $55 for his services in selling the said 11 Clarkdale lots. (38 Cyc. 134; Thayer v. Meeker, 86 Ill. 470, 473.) And in our opinion the deed to said 4 lots having been refused him, he in justice and right was entitled to recover the $40 mentioned in said contract of February 8th, (Bryson v. Crawford, 68 Ill. 362, 365) and also the said sum of $55. The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.
316 - 19329.

1134

ALBERT ROTHBAUM and MANDEL ASTRAHAN, Co-partners as ROTHBAUM & ASTRAHAN,
Appellees,

vs.

SAMUEL SOLOMON and SARAH SOLOMON, his wife, and MORRIS SOLOMON and SARAH SOLOMON, his wife,
Appellants.

APPEAL FROM
COUNTY COURT
COOK COUNTY.

187 I.A. 338

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Albert Rothbaum and Mandel Astrahan, co-partners in business and duly licensed as real estate brokers, commenced an action in the County court of Cook county against appellants, defendants below, to recover certain commissions claimed to be due them. The case was tried before a jury. At the time of the trial none of the defendants was present in court and no evidence in their behalf was introduced. The court instructed the jury to find the issues for the plaintiff and to assess plaintiff's damages at $600. Subsequently, during the argument on the motion for a new trial made by the defendants, the plaintiffs, at the suggestion of the court, entered a remittitur of $400, and the court thereupon refused to grant a new trial and entered judgment against the defendants for $200. This appeal is taken from that judgment.

It appears from the evidence introduced by the plaintiffs that, as a result of their negotiations and labor, a written contract was executed on March 23, 1912, by and between Rosa Rogal and Abraham Rogal, her husband, as first parties, and the defendants, as second parties, in and by which said first parties agreed to convey to said second parties certain premises known as 1309 & 1311 West 12th street, Chicago, and said second parties

1871A. 338

agreed to convey to said first parties certain other premises in Chicago, known as 1317 S. Morgan street, and 1139 S. Wood street, and to pay to said first parties the sum of $1313, all deeds to be passed within 30 days. It was further provided in said contract that said first parties were to pay to plaintiffs, as brokerage fees, the sum of $400, payable only in the event that the deal was consummated, unless the failure of consummation was due to the fault of said first parties. And it was further provided that said second parties (defendants) were to pay, as brokerage fees, to "A. Rothbaum and M. Astrahan $200, to be payable only in the event that deal is consummated, unless failure of consummation is due to fault of second parties."

Plaintiffs commenced the suit on June 15, 1912. The sheriff of Cook county was directed to summon the defendants, Samuel Solomon and Sarah Solomon, his wife, and the sheriff of Alexander county was directed to summon the defendants, Morris Solomon and Sarah Solomon, his wife, and the two last mentioned defendants were duly served by said sheriff of Alexander county. Plaintiffs filed a declaration consisting of the common counts, to which was attached an affidavit stating that plaintiffs' demand was for commissions earned and that there was due plaintiff from the defendants the sum of $200. On July 10, 1912, all of the defendants filed a joint plea of the general issue. None of the defendants filed a plea denying joint liability. Accompanying said plea of the general issue was an affidavit of an agent of all of said defendants, in which it was stated that affiant verily believes that the said defendants, and each of them, have a good defense on the merits to the whole of plaintiffs' demand; that these defendants, on March 23, 1912, entered into a contract of exchange with Rosa Rogal and Abraham Rogal, her husband, for the premises therein described; that before entering into said contract plaintiffs, who were acting as brokers and also as agents

of defendants, falsely represented to defendants that the premises owned by said Rosa Rogal, including the plumbing, were in good condition; that defendants, relying upon said false representations and believing them to be true (although plaintiffs well knew the same were untrue) entered into said contract of exchange; that it was provided in said contract that defendants were to pay plaintiffs the sum of $200, as brokerage fees, only in the event that the deal was consummated, unless failure of consummation was due to the fault of defendants; that after entering into said contract of exchange defendants discovered that the said representations made by plaintiffs were untrue, that the plumbing was in poor condition and out of repair; and that on account of said false representations of plaintiffs, and not through the fault of these defendants, the said contract was not consummated.

On the trial four witnesses testified on behalf of plaintiffs and they were cross-examined by defendants' attorney. The plaintiff, Albert Rothbaum, testified that about three or four weeks after the signing of the contract he had a conversation with the defendants, Samuel Solomon and Sarah Solomon, his wife, and that they both told him that defendants had decided not to consummate the deal and that they would pay plaintiffs their commissions; that the deal was never consummated and that plaintiffs had never received from the defendants the commissions mentioned in said contract or any part thereof. The plaintiff, Mandel Astrahan, testified that before the contract was signed he went on two different occasions to the Rogal building on West 12th street, in company with defendants Samuel Solomon and his wife, and that both of said defendants went through and examined the building, and that on another occasion he went to said building in company with said defendants, Samuel Solomon and wife, and the son, Morris Solomon, and all three defendants then ex-

amined the building. Abraham Rogal testified that he had always been and was ready to consummate the contract, which he and his wife had signed; that some days after the execution of the contract the defendant Emrah Solomon, wife of Samuel Solomon, told him (Rogal) that the defendants would not close the deal as they thought they were asked to pay for the Rogal property two or three thousand dollars more than it was worth.

It is first contended by counsel for defendants that the court erred in denying defendants' motion for a continuance. It appears that when the case was called for trial on November 27, 1918, the attorney for defendants asked for a continuance on the ground that he had learned only the evening before that the case would be called for trial, and that he had been unable to communicate with his clients as they were all out of the city. No affidavits were then presented making any showing as to diligence or as to a meritorious defense. We cannot say that there was any abuse of the discretion of the court in denying the motion. (Condon v. Brockway, 147 Ill. 90; Widmayer v. Davis, 231 Ill. 42, 47; Quincy Whig Co. v. Tillson, 67 Ill. 351; Mantonya v. Huerter, 35 Ill. App. 27, 29.)

It is also contended that the court erred in instructing the jury to return a verdict in favor of the plaintiffs. While it appears that the evidence did not justify the court in directing the jury to assess plaintiffs' damages at $600, we think that the court was fully warranted in directing a verdict in favor of the plaintiffs. By the terms of the contract, which it was admitted in defendants' affidavit of defense had been executed by all defendants, the sum of $200 was to become due to plaintiffs even though the deal was not consummated, provided the failure of consummation was due to the fault of the defendants, and the uncontradicted evidence disclosed that the deal was not consummated and because of the fault of the defendants.

The error of the court in the instruction as to the amount of plaintiffs' damages was corrected by the remittitur and judgment was entered in the proper amount and defendants are in no position to complain. Where there is no conflict in the evidence, and the defendant introduces no evidence tending to support an affirmative defense, it becomes a question of law whether, on the facts, plaintiff is entitled to a verdict. (Marshall v. Grosse Clothing Company, 184 Ill. 421, 425; Anthony v. Wheeler, 130 Ill. 128, 132.) Furthermore, under section 55 of the Practice Act the defendants in their affidavit of merits, filed with their plea, were required to specify the nature of their defense. And "all defenses, the nature of which are not set up in the affidavit, are considered waived and are unavailable on the trial." Madison v. Fortune Bros. Brewing Co., 163 Ill. App. 378, 379.) The only defense specified in defendants' affidavit was that plaintiffs, as brokers and agents of defendants, made certain false representations as to the condition of the Rogal premises, which were relied upon by the defendants, and that before the exchange of the properties was made the defendants discovered that said representations were false and that on account of said representations the exchange was not consummated. There was no evidence introduced tending to support this defense.

It is further contended that before plaintiffs could recover in this action it was incumbent upon them to prove that the first parties to said contract (the Rogals) had tendered a deed of the premises on West 12th street to the defendants. The evidence discloses that the defendants refused unconditionally to consummate the contract. The law does not require a party to perform an act which would be idle and useless. (Lyman v. Sedney, 114 Ill. 388, 410; Bowersock v. Beers, 82 Ill. App. 396, 400.)

Finding no reversible error in the record, the judgment of the County court is affirmed.

AFFIRMED.

of the County Court in affirmance.

Finding no reversible error in the record, the judgment

March Term, 1913; No.

342 - 19386.

1130

187 I.A. 350

DAVID N. HANSON, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
EMMA M. SMITH, as Executrix of the Last Will of CHARLES M. SMITH, deceased, Appellant.	)	COOK COUNTY.

STATEMENT OF THE CASE. Charles M. Smith, in his lifetime, purchased certain land in Cook county, Illinois, of David N. Hanson, appellee, and as part of the purchase money made, executed and delivered to Hanson his three promissory notes, each for $1,050, dated January 6, 1893, due respectively on or before two, three and four years after date, and to secure said notes executed a trust deed on said land. Smith did not pay any of said notes. On August 23, 1899, he filed his petition in bankruptcy in the United States District Court for the Northern District of Illinois, and scheduled said notes as secured claims, naming "Braman Loveless or unknown owners" as the holders thereof. It does not appear that Hanson received any notice of said bankruptcy proceedings, or that Hanson or Loveless or anyone made any claim in said bankruptcy proceedings on said notes or received any dividend on account thereof. On October 30, 1899, by order of said United States Court, Smith was duly discharged in bankruptcy. Subsequently, Hanson and one Charles J. Kavanagh (named as successor in trust in said trust deed), as complainants, filed their bill in the Superior court of Cook county against Smith and other parties, as defendants, to foreclose said trust deed. The bill was in the usual form, and prayed, inter alia, that an account might be taken, that Smith might be decreed to pay complainants whatever should appear to be due upon the taking of such account, that in default of such payment the mortgaged

property might be sold, etc., and that complainants might have execution against Smith for any balance that should remain due if the sale failed to provide sufficient funds to pay the whole of said debt, costs, etc. Smith was personally served with summons in this foreclosure suit, but he failed to appear and was duly defaulted. He did not plead his said discharge in bankruptcy. The cause was referred to a master in chancery who found that there was due Hanson on said notes, and for accrued interest and for advancements for taxes and special assessments on said property, the total amount of $8,515.42, and that Hanson had a valid first lien upon said property for said amount and costs and expenses, and recommended that a decree be entered. Subsequently the property was sold by the master under a decree of sale, but it did not bring sufficient money to pay the debt, costs and expenses, etc., and on April 24, 1905, a "deficiency decree and judgment" was entered by said Superior Court against Smith for the sum of $1,800.08. Several years after the entry of this deficiency decree, no part of it having been paid, Smith died, and letters testamentary were issued by the Probate Court of Cook County to Emma M. Smith, executrix, etc. On June 26, 1912, said Charles J. Kavanagh, by written assignment, assigned and transferred to Hanson all his right, title and interest in said deficiency decree. On July 8, 1912, Hanson filed his amended claim, in his own right and as assignee of said Kavanagh, against the estate of Charles M. Smith, deceased, in said Probate Court, based upon said deficiency decree, claiming the said sum of $1,800.08, with legal interest thereon from the date of the entry of said decree. On July 25, 1912, after a hearing, the Probate Court allowed Hanson's claim against said estate for the sum of $2,494.30, as of Class 7, to be paid in due course of administration. From

this order of the Probate court, said Emma M. Smith, executrix, etc., prayed and perfected an appeal to the Circuit court of Cook county. In the Circuit court, the cause was submitted to the court for trial without a jury, and on December 18, 1912, the court, after a full hearing, at which the above facts inter alia appeared, entered a finding for the claimant, Hanson, sustaining the order of the Probate court of July 25, 1912, and assessing his damages at the sum of $2,487.56, and, after overruling motions for a new trial and in arrest of judgment, entered judgment upon the finding. Emma M. Smith, as executrix, etc., seeks by this appeal to reverse the judgment.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for appellant contends that the discharge in bankruptcy of Charles M. Smith released him from personal liability on said notes, that no deficiency decree in the foreclosure suit should have been entered against him without first giving him an opportunity after the sale of the property and before the entry of such decree to plead his discharge, and that because he was not given any notice of the proposed entry of such decree, his executrix has the right to plead his discharge in bankruptcy when it is attempted to enforce the collection of the amount of such decree out of his estate. Counsel for Hanson contends that Smith's discharge in bankruptcy did not extinguish Smith's debt to Hanson, but merely furnished a defense to the rendition of a personal judgment against Smith, provided Smith in apt time pleaded and proved such discharge, and that, as Smith did not plead his discharge in the foreclosure suit but suffered a default to be taken against him, and as the deficiency judgment was duly entered and the same is not attacked on the ground of fraud, that judgment cannot now be annulled but remains as a valid claim against Smith's estate.

In 2 Remington on Bankruptcy, sec. 2032, it is said: "The discharge must be set up and proved as a defense. And if the discharge is not set up and proved, it is waived; and the resulting judgment will be good." In Marshall v. Tracy, 74 Ill. 379, it is said; "The doctrine best sustained by authority is that the original cause of action is not destroyed by the discharge in bankruptcy." In Bush v. Stanley, 182 Ill. 408, 416, it is said: "The discharge is analogous, in effect, to the statute of Limitations, in so far as it does not annul the original debt, but merely suspends the right of action for its recovery. * * * It follows, necessarily, that the privilege is purely personal to the bankrupt, and if he does not choose to avail of it, no one else can do it for him."

As we understand the position of counsel for appellant he does not dispute the law as above stated, but contends that under the particular facts of this case the same is not applicable. He argues, in substance, that by the allegations of the bill to foreclose he was only apprised of facts to which he had no defense, that as the bill contained no allegation that the property was scant security he had a right to assume that the property would sell for enough to pay the notes, and that, therefore, it was not necessary for him to plead his discharge in the foreclosure suit in the first instance, and that when it was ascertained that there would be a deficiency he should have been notified and given an opportunity to plead his discharge as against any personal judgment or decree against him.

We do not think there is any merit in the contention. After Smith had been discharged in bankruptcy the bill to foreclose the trust deed securing the notes was filed, and in the prayer to the bill the complainants prayed that, if the foreclosure sale failed to provide sufficient funds to pay the whole debt,

costs and expenses, they might have execution against Smith for the balance. Smith was duly served with summons and he did not appear and plead his discharge in bankruptcy, as was his privilege, and subsequently a deficiency judgment against him was entered, from which no appeal was taken. In 2 Loveland on Bankruptcy, sec. 902, it is said: "Where a discharge has been granted before the suit on the debt is commenced the plea of discharge should be set up in the first instance." In Lackey v. Steere, 191 Ill. 599, 603, it is said: "It will be seen the Supreme Court in Dimock v. Revere Copper Co., 117 U. S. 559, has held, in conformity with the state courts of Massachusetts, that a judgment rendered against the bankrupt, after his discharge, where he failed to plead such discharge, was conclusive on the question of his indebtedness, and hence the judgment was valid." In said Dimock case (117 U. S. 559) it is said on page 566: "We are of the opinion that, having in his hands a good defence at the time the judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all defences which he might have made, including this, the judgment is a valid judgment, and that the defence cannot be set up here in an action on that judgment."

The only case cited by counsel for appellant to sustain his position is Scott v. Ellery, 145 U. S. 381. That case is quite dissimilar to the present case. The court held that the case fell distinctly under a section of the former Bankruptcy Act which provided that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be

deemed to be discharged and surrendered thereby." The court said (p. 394): "When Scott proved his debt in the bankruptcy court, he waived his right, pending the question of Kilery's discharge in the bankruptcy court, to take a deficiency decree against him in the court in Iowa; and the discharge having been granted, the right to such a decree was lost altogether." In the present case it does not appear that Hanson proved his debt in the bankruptcy court.

We are of the opinion that the judgment rendered by the Circuit Court of Cook County was proper and it is, therefore, affirmed.

AFFIRMED.

ALICE M. BABCOCK, CARRIE A. RITTER, and BESSIE B. RALSTON,
Complainants,

vs.

STELLA P. HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, deceased, ELLEN E. FOLLETT, LYDIA KEENE CHAPMAN and MRS. HELEN M. CHAPMAN,
Defendants,

ORIGINAL BILL

APPEAL FROM CIRCUIT COURT COOK COUNTY.

HELEN M. CHAPMAN
(Cross-Complainant) Appellee,

vs.

ALICE M. BABCOCK, CARRIE A. RITTER, BESSIE B. RALSTON, STELLA P. HULETTE, individually, and STELLA P. HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, deceased,
(Cross-Defendants) Appellants.

CROSS-BILL.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal prosecuted to reverse a decree rendered in the cross-bill in the above entitled cause. Arthur B. Pease died testate and insolvent April 7, 1911. He left his affairs entangled and involved. He was trustee of a trust created by the will of John R. Parsons, deceased, and he had in his possession as such trustee assets aggregating about $55,000. After the death of Pease, Alice M. Babcock, Carrie A. Ritter and Bessie B. Ralston, beneficiaries in the Parsons trust, filed their bill of complaint against Stella P. Hulette, executrix of the last will and testament of Arthur B. Pease, deceased. By the bill they asked for the appointment of a successor in trust and for an accounting and turning over of the assets of the trust to the new trustee by the said executrix. The State Bank of Chicago was appointed the successor in trust of the Parsons trust. By an amendment of the original

bill of complaint, Helen M. Chapman (the cross-complainant) was made a party defendant to the same. There was in the possession of the executrix of the said Pease a certain note for $600, known as the Van Emden note. This note was secured by a trust deed, and there was also in the possession of the executrix an abstract to the real estate mentioned in the trust deed. Helen M. Chapman claimed to be the owner of the note, trust deed and abstract, and on June 18, 1912, she filed a cross-bill, asserting her ownership to the same and asking that she be decreed to be the owner of the same. Issue was joined on this cross-bill and the cause came on for hearing before the chancellor. The chancellor found and decreed that the note, trust deed and abstract belonged to the cross-complainant.

The appellants have prayed this appeal from the decree and the sole point urged is that the evidence in the case does not warrant the finding of the chancellor. We have carefully examined the evidence presented to the chancellor, and we are satisfied that he made a correct finding, and the decree of the Circuit Court of Cook County is therefore affirmed.

AFFIRMED.

187 I.A. 351[2]

ALICE M. BABCOCK, CARRIE A RITTER and BESSIE B. RALSTON,
Complainants,

vs.

STELLA P. HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, deceased, ELLEN E. FOLLETT, LIDIA KEENE CHAPMAN and MRS. HELEN M. CHAPMAN,
Defendants.

ORIGINAL BILL

APPEAL FROM CIRCUIT COURT COOK COUNTY.

HELEN M. CHAPMAN,
(Cross-Complainant) Appellee,

vs.

ALICE M. BABCOCK, CARRIE A. RITTER, BESSIE B. RALSTON, STELLA P. HULETTE, individually, and STELLA P. HULETTE, Executrix of the Last Will and Testament of ARTHUR B. PEASE, deceased,
(Cross-Defendants) Appellants.

CROSS-BILL.

ADDITIONAL OPINION OF MR. JUSTICE SCANLAN FILED ON PETITION FOR REHEARING.

The appellants have filed a petition for a rehearing in this case in which they refer us to section 17 of the Appellate Court Act, in which it is provided:

> "All opinions or decisions of said court upon a final hearing of any cause shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the cause in which rendered."

Counsel for the appellant, with considerable earnestness and apparent sincerity, insists that this court, in the opinion heretofore filed in this case, has not given its reasons for its decision. We cannot agree with counsel in this contention. There was no controverted question of law in the case, and the sole point for us to decide was: Did the evidence in the case warrant the finding of the chancellor? We decided that it did, and we affirmed the decree of the Circuit Court of Cook County. The reason for our decision was plainly stated in the short opinion filed

by us. If we understand the argument of the counsel correctly, it amounts to this: That it is our duty, under the law, to state in our opinion the evidence in the case, to analyze the same, and to give our conclusions as to the credibility of the witnesses and the weight that should be attached to the various pieces of evidence in the case. No such duty is imposed upon this court. We are not compelled to sustain with arguments the reasons given for our decisions.

The facts in the present case were exceedingly simple, and the sole question that the chancellor was called upon to decide was: Were the complainants in the original bill or the cross-complainants the owners of a certain trust deed note, known as the Van Emden note? It appears from the evidence that Arthur S. Pease transacted business for the complainants and the cross-complainant. At his death, his executrix found in the office of Pease the Van Emden note. The executrix was satisfied that the note did not belong to the Pease estate, and as the complainants and the cross-complainant claimed ownership of the same, the executrix told the parties that they would have to settle in court the ownership of the note. It will be noticed that neither the complainants nor the cross-complainant had possession of the note, and the proceedings before the chancellor as to this particular note were similar in character to a case of interpleader. The evidence produced before the chancellor as to the ownership of the note was substantially as follows: The books kept by Pease showed that on October 15, 1901, the cross-complainant was credited with a check for $600 and charged $300 for the Van Emden note. On the same date Pease charged the cross-complainant's account with $30 for his commission in the Van Emden note matter. Pease kept a certain book known as the John R. Parson estate book, and in this book he credited, during the years 1907, 1908, 1909 and 1910,

certain items that apparently refer to interest on the Van Emden note. The cross-complainant apparently received no interest from Pease on account of the Van Emden note. The complainants introduced no evidence tending to show that the Parson estate ever paid any consideration for the note. No objection was made by either party to the introduction in evidence of the aforesaid entries in the Pease books, and both parties seem to have been satisfied to rest their claims for the note on this character of evidence. The chancellor was called upon to decide, under the ~~xxxxx~~ evidence thus presented to him, whether the complainants or the cross-complainant were entitled to the possession and ownership of the note. He decided, and as we think properly, in favor of the cross-complainant. The complainants in the lower court and in this court, seem to place great stress upon the fact that the cross-complainant did not have the possession of the note. Neither did the complainants. The party having the possession of the note was not claiming the ownership of the same, and was simply calling upon the court to decide which of the two claimants was entitled to it. The executrix has taken no appeal from the decision of the chancellor. The complainants argue with great emphasis that the evidence to sustain the claim of the cross-complainant is of a very unsatisfactory character. It is only necessary to say in response to this that the proof of the complainants to sustain their claim was of a very much more unsatisfactory character. The petition for a rehearing is denied.

March Term, 1913, No.
161 - 19182.

187 I.A. 353

JOHN A. NIPPER, Defendant in Error,	)	ERROR TO
vs.	)	SUPERIOR COURT
THE WABASH RAILROAD COMPANY, Plaintiff in Error.	)	COOK COUNTY.

STATEMENT OF THE CASE. This was an action on the case, brought by John A. Nipper, defendant in error (hereinafter designated as the plaintiff), against the Wabash Railroad Company, plaintiff in error (hereinafter designated as the defendant), for personal injuries alleged to have been received by the plaintiff at Danville, in the State of Illinois, on April 25, 1909.

The declaration containing one count alleged that on April 25, 1909, the defendant was a corporation operating a certain railroad in and through Danville, Illinois, across a public street in Danville, namely, Van Buren street, and that it was then and there the duty of the defendant to exercise care for the safety of other persons who might use or be upon said street at the place of said crossing, and not to obstruct said crossing so as to make it dangerous to others who might use or be upon said street at the place of said crossing, and not to obstruct said crossing so as to make it dangerous to others upon said street there; yet the defendant, not observing its duty in this behalf, in the night time of said day, when at said crossing it was dark, negligently and carelessly obstructed said crossing, and placed thereon and in the street there, without any guard or protection, while a certain train was crossing said street, a certain dangerous obstruction, namely, a certain bucket, so that while the plaintiff, in the exercise of ordinary care for his own safety, was in the act of crossing said street there, he ran into said bucket, and by reason thereof he fell and was thrown

to and upon the ground there, so that his left foot went under one of the wheels of said passing train, and said left foot was thereby severed, etc., to the damage of the plaintiff in the sum of $25,000. The case was tried before a jury and a verdict was returned finding the defendant guilty and assessing his damages at $3000. A motion for a new trial was overruled, and judgment was entered on the verdict.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

After we had filed an opinion affirming the judgment of the Superior Court in this case, we granted a petition for a rehearing, because of a very earnest plea made by the counsel for the defendant that the verdict of the jury is manifestly against the weight of the evidence. We have, since the granting of the petition for a rehearing, carefully re-read and re-analyzed the entire evidence in the case. That the defendant introduced evidence which, if believed by the jury, would have warranted a verdict against the plaintiff, we readily concede. There is, however, a weakness in the defendant's evidence that, in our judgment, must have strongly influenced the jury in arriving at its verdict. Defendant's proof supports two theories as to the way in which the accident occurred that are utterly inconsistent with each other. It is not surprising that the jury, confronted with such a situation in the proof of the defendant, should have refused to believe the evidence supporting either of the two theories. The defendant's counsel in the petition for a rehearing appreciate this weakness in defendant's proof, and to escape its effect, they have argued that certain evidence that supports a theory of the accident different from the one first advanced by the defendant, was introduced by it solely for the purpose of impeaching the plaintiff's testimony as to how and where the accident happened; that the defendant

by this evidence did not intend to advance a theory of the accident, different from the one first advanced by it. After a careful examination of the evidence and certain instructions offered by the defendant, we are satisfied that the defendant did attempt to escape liability by introducing evidence that supported two theories as to the manner and place of the accident utterly inconsistent with each other.

It is clear from the evidence that the plaintiff made out a prima facie case. In fact, the able and experienced counsel for the defendant, at the close of the evidence for the plaintiff, did not ask that the jury be instructed to find a verdict for the defendant. The jury, with far better opportunities than we to pass upon the credibility of the witnesses and the weight that should be attached to the testimony, has made a finding in favor of the plaintiff's theory of the accident. In our judgment, the case is one in which great weight should be attached to the findings of the jury. We must also take into consideration the fact that the trial court has approved the verdict. We have nothing but the cold record before us, and after a very careful consideration of the question, we have arrived at the conclusion that we cannot say that the verdict is manifestly against the weight of the evidence.

Counsel for the defendant insist that the plaintiff was not injured ~~xx~~ on a public crossing, but on the right of way of the railroad company; that the plaintiff was a trespasser thereon, and that he is therefore not entitled to a recovery under the declaration in the case. Whether the plaintiff was injured on a public crossing or on the right of way of the railroad company was one of the controverted questions of fact in the case. The plaintiff alleged in his declaration that the accident happened on a public crossing, and his evidence tends to support this allegation. The accident occurred in Danville,

Illinois, but the case was tried in Cook County. If there was not a public crossing at Van Buren street, as contended for by the railroad company, this was a perfect defense to plaintiff's claim, and the defendant could have easily introduced satisfactory evidence on this point. It failed to do so. An inference unfavorable to the defendant arises from this fact. We do not mean by this to hold that the burden was upon the defendant to prove that there was not a public crossing at Van Buren street. The burden was upon the plaintiff to prove that the said crossing was a public one. The inference referred to is a circumstance, however, that a jury or a court would be justified in taking into consideration in passing upon the question as to the nature of the crossing at Van Buren street. We cannot say that the finding of the jury that the accident occurred on a public crossing is manifestly against the weight of the evidence.

The defendant complains that the court erred in giving to the jury, at the instance of the plaintiff, the following instruction:

> "The jury are instructed that it is charged in the plaintiff's declaration in this case that on the 25th day of April, 1909, in the night-time, the defendant, the Wabash Railroad Company, operated its trains across a certain public street, namely Van Buren street, in the City of Danville; that on said date, when it was dark at said crossing, said railroad company negligently and carelessly obstructed said crossing and placed thereon and in the street there and between certain of its tracks there, and permitted to remain there without any guard or protection, while a certain train was crossing said street, a certain dangerous obstruction, namely, a certain bucket, so that while the plaintiff, in the exercise of ordinary care for his own safety, was in the act of crossing said street there, he ran into said bucket, and by reason thereof he fell and was thrown to and upon the ground there, so that his left foot went under one of the wheels of said passing train, and he was thereby injured. The jury are instructed that if you find from the evidence that the plaintiff has proved his case by a preponderance of the evidence as alleged in the plaintiff's declaration as aforesaid, then you are instructed to find the defendant, the Wabash Railroad Company, guilty."

Defendant contends that the instruction assumes that there was a public crossing at Van Buren street and the railroad tracks, and that as this was one of the hotly controverted facts in the case, the defendant was injured by the giving of the instruction. We think this complaint is without merit. The instruction simply informs the jury that the plaintiff charges in his declaration that the railroad company "operated its trains across a certain public street, namely Van Buren street, in the City of Danville." We do not think that it can be reasonably urged that the jury would infer from this language in the instruction that the court assumed that there was a public crossing at Van Buren street across the railroad tracks.

The defendant contends that the court erred in refusing to give to the jury the following instruction:

> "The jury have no right to disregard the testimony of a witness where such testimony is not contradicted, and such witness has not been impeached."

There are a number of reasons why this instruction is bad. In the first place, the testimony referred to in the instruction is not confined to that bearing upon a material matter or thing in the case. It is only material evidence that should be considered by the jury. The testimony of a witness on immaterial matters or things neither tends to prove or disprove his credibility. The instruction is bad in another respect. While it is true that a jury is not justified, through mere caprice or without cause, in arbitrarily disregarding the testimony of a witness, still a jury may be absolutely justified in disregarding the testimony of a witness even though it be not directly contradicted or impeached. The testimony in itself may be inherently unbelievable; the testimony may be plainly false and yet impossible of direct contradiction or impeachment. The appearance of the witness, his lack of intelligence, the manner

in which he testifies, may justify a jury in disregarding his testimony, even though the witness be not directly contradicted or impeached. Counsel for the defendant argue that if a witness states matters that are unbelievable, that he is impeached by the force of his own testimony. While in a very refined and technical sense this may be true, it is not ordinarily so understood. We do not think that the language in the instruction, "such witness has not been impeached," would be understood by the jury as having the meaning now claimed for it by counsel. The counsel drafted and had submitted to the jury two instructions on the subject of impeachment, and in neither of these was the jury informed that the word "impeachment" had the broad meaning now claimed for it by the counsel.

The judgment of the Superior Court of Cook County will be affirmed.

AFFIRMED.

(1141)

OPINION SENT TO CALLAGHAN & COMPANY
FRIDAY JULY 3rd 1914.

OPINION FILED BY THE "D" BRANCH APPELLATE COURT
WEDNESDAY 24th 1914.

TRIAL JUDGE.

19406-Transferred to Supreme Court. R. S. Tuthill

(March term 1913)
19408
Leo J. Gilbert. atty for Appellants
Bernstein Grossman and Bernstein - attys for Appellees
all files Transferred

187 I.A. 370

FILED
APPELLATE COURT
JUN 24 1914
ALFRED R. PORTER CLERK

Joseph H. Fitch,
Kickham Scanlan,
Hugo Pam.

D

374 - 19408.

EMMA DICKERHOOF and HENRY E. DICKERHOOF, Appellants, vs. EDWARD WOOD, Individually, and as Executor of the Last Will and Testament of JOHN BAZELEY, Deceased, MYRTLE BAZELEY WRAITH, ROBERT WRAITH and BLANCHE BAZELEY, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery, filed in the Circuit Court of Cook County, to set aside the last will and testament of John Bazeley, deceased, which was admitted to probate in the Probate Court of Cook County on January 5, 1911. By the terms of the will, the sum of $500 is bequeathed to the daughter and two grandchildren of the deceased, to be divided equally between them, and all the rest of the testator's property, both real and personal, is devised to Edward Wood, who is a nephew of the deceased third wife of the testator. The bill seeks to set aside the will upon the grounds, as stated in appellant's brief, of "unsoundness of mind impaired by sickness and undue influence." It appears from the transcript that the whole estate of the deceased consisted of a house and lot in Chicago, Illinois, said to be worth about $3500, upon which there was an incumbrance of $1,000. From these facts it follows, upon the authority of Gottmanshausen v. Wolfing, 244 Ill. 270, that a freehold is directly involved in this proceeding, and that this appeal should have been taken to the Supreme Court. Accordingly, in pursuance of section 102 of the Practice Act, the clerk is directed to transmit the transcript and all files herein to the clerk of the Supreme Court.

CAUSE TRANSFERR

381 - 18848.

187 I.A. 388

CHICAGO TITLE AND TRUST COMPANY, Trustee, et al.,
Appellees,

vs.

MAURICE FRANKLIN ET AL., HERBERT W. DUNCANSON,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BAUM
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Herbert W. Duncanson from a decree of the Superior Court foreclosing a certain trust deed executed by Mandel Frankel under the name of Maurice Franklin. Grace H. Goldsmith, the holder of certain bonds secured by said trust deed and one of the appellees, has assigned certain cross-errors.

In 1904, Harry and Grace Howell were the owners of certain real estate situate at the corner of Lawrence and Winthrop avenues in the City of Chicago. The appellant was then engaged in the building business and had in his employ a man by the name of Mandel Frankel. Through negotiations carried on between appellant and one Clover, a real estate broker, the Howells agreed to sell the property for $9,500, $6,000 to be paid in cash and the balance, $3,500, to be evidenced by two notes, each for $1,750, to be secured by a trust deed on the property, subject to a prior trust deed securing a bond issue of $45,000, to be placed upon the property, the proceeds of which were to be used in constructing a flat building on the premises. The cash payment of $6,000 was made to the Howells by appellant, and by his direction the property was conveyed by them to Mandel Frankel, under the assumed name of Maurice Franklin. Appellant then ar-

187 I.A. 888

ranged with the Jennings Real Estate Loan Company, hereinafter called the Jennings Company, for the negotiation by it of bonds aggregating $45,000, to be secured by a prior trust deed on the property, and on January 13, 1905, said Frankel at the direction of appellant and by the name of Maurice Franklin executed 210 bonds, amounting to $45,000, payable at the office of the Jennings Company, to bearer or to the registered owner thereof, and to secure the payment of said bonds also then executed a trust deed conveying said property to the Chicago Title & Trust Co., as trustee. Nos. 1 and 2 of said bonds were for $500 each and matured January 13, 1906; bonds numbered 3 to 152 inclusive were for $100 each, two of which from number 3 to number 96 inclusive matured on the 13th of each month commencing February, 1906; bonds numbered 153 to 210 were for $500 each; and bonds numbered 97 to 210 inclusive matured January 13, 1910. Out of the proceeds of these bonds $4,500 was charged and retained by the Jennings Company as commission for its services in negotiating the bonds. Substantially the balance of the proceeds of said bonds was, upon orders by appellant, paid by said Jennings Company for labor performed and material furnished in constructing the flat building on the mortgaged premises. Under the terms of the contract of purchase from the Howells a second mortgage, securing two notes each for $1,750, payable to the order of the maker and by him endorsed and delivered to Harry Howell, was executed by said Frankel by the name of Maurice Franklin, and he also then executed a third mortgage on the premises to secure a note for $1,500, payable to his order and by him indorsed and delivered to appellant.

In November, 1905, after the completion of the flat building on the premises, appellant negotiated a sale of the same to William R. and Sallie J. Fitzgerald of Chatham, Vir-

ginia, and at the direction of appellant, Frankel by the name of Franklin, conveyed the premises to said Fitzgeralds for a stated consideration of $100,000, subject to encumbrances amounting to $50,000, coming due at various dates, which the grantees assumed as part consideration for the premises. These encumbrances consisted of the bond issue of $45,000, the Howell second mortgage of $3,500, and appellant's third mortgage of $1,500. The consideration paid by the Fitzgeralds was $5,000 in cash received by appellant, a farm near Chatham, Virginia, and certain property in the town of Chatham, all of which were conveyed by the Fitzgeralds to Maurice Franklin. At the instance of the Fitzgeralds these conveyances were subsequently, on June 10, 1909, set aside by the Supreme Court of Appeals of Virginia, upon the ground that the exchange of properties was procured by the fraud and misrepresentation of appellant, Duncanson. Fitzgerald v. Frankel et al., 109 Va., 803.

The Jennings Company sold to various parties all or substantially all of the $45,000 issue of bonds secured by the trust deed here sought to be foreclosed. Bonds 1 and 2 for $500 each maturing January 13, 1906, bonds 3 and 4 for $100 each maturing February 13, 1906, and bonds 5 and 6 for $100 each maturing March 13, 1906, were paid at maturity and cancelled. After the property was conveyed to the Fitzgeralds in December, 1905, appellant acted as their agent in collecting the rents until March, 1906, when he was succeeded in that capacity by the Jennings Company, which collected the rents for April and May, 1906. During the time of the transaction here involved appellant controlled several other buildings upon which bond issues had been negotiated by the Jennings Company, and it was agreed and understood between appellant and the Jennings Company that as bonds of the several issues or interest coupons thereon matured, the same should be taken

up by the Jennings Company and held by said company uncancelled and that when a considerable number of said bonds or coupons had been so taken up, the Jennings Company would notify appellant of the amount of the same and appellant would make settlement with the company therefor and the company would thereupon cancel and deliver said bonds and coupons to appellant.

On July 23, 1910, Charles H. McIntyre, claiming to be the owner and holder of bonds 7 to 13 inclusive, the last two of which matured June 13, 1906, and claiming that payment thereof had been in default for more than 30 days notified the trustee in the trust deed, The Chicago Title and Trust Company, that by reason of such default he elected to declare the whole amount of the principal of the bonds secured by said trust deed immediately due and payable, and applied to said trustee to immediately institute suit to foreclose said trust deed. Said bonds 7 to 13 inclusive were delivered to said trustee, and on July 25, 1910, it filed its bill to foreclose said trust deed and made all the bond holders, tenants in possession and junior encumbrancers parties defendant to said bill.

A large number of the bond holders filed their answers admitting the averments of the bill. Grace R. Goldsmith answered that she was the owner of bonds 181, 182 and 183 for $500 each; that appellant Duncanson, and one Bailey and J. Elliott Jennings and the Jennings Company had conspired to defraud the prospective purchasers of bonds; that the building and property cost only $35,000 and that $10,000 in bonds or their proceeds were divided between appellant, Bailey, Jennings and the Jennings Company, and that the Jennings Company had issued false statements in regard to the property for the purpose of selling the bonds, and was the owner of a large number of bonds which should not be allowed as a lien upon the property. Said defendant Goldsmith also filed her cross

bill praying that the bonds owned by appellant and Jennings and the Jennings Company be decreed to be subject to the lien of her bonds and that she have a deficiency decree against them, if upon a sale of the property sufficient was not realized to pay her bonds in full. By an amendment to her cross-bill she alleged that appellant was the undisclosed principal of Frankel and that he was jointly liable with Frankel upon the bonds held by her.

Frankel in his answer to the original bill admits that he signed the trust deed and bonds by the name of Franklin at the request of and as the obligation of appellant; alleges that he never had any interest in the property, but that the same belonged to appellant and his wife; that bonds 7 to 13 had been paid, but were not cancelled and that McIntyre was not the owner of said bonds, but that the same were owned by Jennings and the Jennings Company and were placed in the hands of McIntyre for the purpose of foreclosing at the request of Jennings; that the Jennings Company exacted usurious interest to the amount of $4,500 and that the bonds claimed to be held by McIntyre, Marshall and Moore belonged to the Jennings Company and should be set off against said usurious interest.

The cause was referred to the master for proofs and findings and a decree was entered in accordance with the findings of the master.

The decree finds that bonds 7 to 210 inclusive were unpaid; that default was made in the payment of bonds 7 to 13 inclusive and such default existed for more than 30 days, whereby, as provided in the trust deed, McIntyre, as the owner and legal holder of said bonds, declared the whole bond issue due and payable, and requested the trustee to institute the foreclosure proceeding; that there was due the complainant $250 for its fees, and $442.83 for fire insurance, stenographer's

fees, court costs and other expenses, and for the fees of its solicitor $3,000, and to cross-complainant Goldsmith, $140 for the fees of her solicitors, which amounts were liens upon the property; that the trust deed conveyed the rents, issues and profits from the property as security for the bonds. The decree further finds the amount due each of the several bond holders, among which are the following: to Chas. H. McIntyre on bonds 7, 8, 9, 10, 11, 12, 13, 113, 114, 147, 149 and 160, $2,868.73; to Chloe Moore on bond 14, $143.13; to Jennings Real Estate, Loan and Trust Company on bond 15, $143.13; to George Taylor on bonds 153 and 154, $1,431.08; to Grace R. Goldsmith on bonds 151, 152, and 153, $2,146.62. The decree further finds that there was due Harry Newell as the holder of the second mortgage, $4,926.34; that appellant Duncanson was the equitable owner of the equity of redemption in the premises and was also the owner and holder of the third mortgage thereon for $1,500; that the encumbrance represented by said third mortgage was merged in said Duncanson as the equitable owner of the equity of redemption, and had been obliterated by such merger and did not constitute a lien on the premises; that as to the bonds belonging to cross-complainant Grace R. Goldsmith said Duncanson was the undisclosed principal of Mandel Frankel, alias Maurice Franklin, and was individually obligated to pay the same; that there was in the hands of the receiver on January 1, 1912, $19,130.39. The decree allows to the receiver for his services $1,750, and to his attorney $1,000, and directs that the balance, amounting to $16,380.34, be paid by him as follows: 1st, the taxed costs of the complainant, the cross complainant and the bond holders; 2nd, $448.83 to the complainant trustee for its cash disbursements; 3rd, $350 to said complainant trustee for its fees; 4th, $3,000 to said complainant trustee for its solicitors' fees; 5th, $300 to

cross complainant Grace M. Goldsmith for her solicitors' fees; 6th, the balance to the several bond holders pro rata. The decree further provides that in default of the payment of the amounts found due the several claimants and bond holders within 10 days from the date of its entry, the property be sold and the proceeds applied as follows: 1st, to the payment of all costs of sale; 2nd, to the payment of any balance due on the bonds as found in the decree; 3rd, the payment of the amount due on the second mortgage of Harry Howell; 4th, to the payment of the balance to the owner of the equity of redemption.

First. It is insisted that Charles H. McIntyre was not on July 23, 1908, the owner of bonds 7 to 13 inclusive; that said bonds had then been paid; and that McIntyre could not, therefore, declare the entire bond issue due, and the court was without jurisdiction of the subject matter of the foreclosure.

A consideration of these questions is somewhat complicated by the anomolous and contradictory attitude assumed by appellant. He disclaims any liability on the bonds, either as maker or otherwise, and merely claims an interest in the subject matter as a junior mortgagee, and yet assumes to assert every right of defense to the foreclosure which might properly be asserted by a mortgagor, or one primarily liable for the payment of the debt. Frankel, the actual maker of the trust deed and bonds, under the name of Franklin, did not appeal from the decree.

However confused and devious the attitude and methods of the Jennings Company may have been, appellant represents no substantial equity that should prevail to prevent the large number of bond holders, who purchased the bonds in good faith as an investment, and to whom there was due at the entry of the decree approximately $50,000, out of a total of $54,735.45, from realizing in this foreclosure proceeding upon a meager

security which has been manipulated in an evident effort to embarrass such bond holders in the collection of their bonds.

Whether bonds 7 to 12 inclusive were, prior to their maturity and at the time of the purported transfer of the same by the Jennings Company to McIntyre, owned and held by the Jennings Company, or by some other person or persons, who presented the same at maturity at the office of the Jennings Company, where said bonds were taken up by said Company and retained by it uncancelled, is not clearly disclosed by the evidence. There is no pretense that said bonds were paid or liquidated by Frankel or by appellant who, with the knowledge and consent of Frankel, assumed all the rights in the property incident to a holder of the equity of redemption. If the bonds were then the property of the Jennings Company, they remained wholly unpaid. If said bonds were taken up by the Jennings Company at maturity, it is admitted they were so taken up under an agreement with appellant, whereby they should be held by the Jennings Company uncancelled, until they should be subsequently paid by appellant. The agreement that the Jennings Company should hold the bonds so taken up by it uncancelled must have been understood by the parties as amounting to an agreement that as to the bonds so taken up by it the Jennings Company should be subrogated to the rights of the prior holders of the bonds. If the bonds so taken up by the Jennings Company were to be considered as paid, and the Jennings Company was merely to hold a claim for the payment thereof against appellant or Frankel, there was no occasion for the agreement that such bonds should be held by the Jennings Company uncancelled. The true construction of the agreement brings it within the principle of conventional subrogation, which, as is said in House Savings Bank v. Bierstadt, 268 Ill., 518, "results from an equitable right springing from an express agreement with the debtor, by

which one advances money to pay a claim for the security of which there exists a lien; by which agreement he is to have an equal lien to that paid off; whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien."

The bonds were transferrable by delivery, and if they were acquired by the Jennings Company under a right of conventional subrogation, they were acquired and held as by purchase and remained in the hands of the Jennings Company transferrable by delivery.

Whether or not said bonds with others were in fact transferred by the Jennings Company to McIntyre was a controverted question of fact as to which we are not disposed upon this record to interfere with the finding of the master adopted and concurred in by the chancellor. No person claiming to be the owner of said bonds contested the title of McIntyre thereto and the title of McIntyre was admitted by the Jennings Company in its answer.

In Chicago Title & Trust Co. v. Felter, 170 Ill. App., 68, relied upon by counsel for appellant, the doctrine of conventional subrogation was not involved and the case is, therefore, to be distinguished from the case at bar.

Second. It is urged that the decree erroneously provides for the payment of $250 to the Chicago Title & Trust Company, trustee in the deed of trust, for its fees as such trustee. There is no warrant in the evidence for the allowance of the amount named in the decree. The allowance is grossly excessive and the decree will be modified by substituting in lieu of such allowance the sum of $50.

Third. The allowance in the decree of the items aggregating $448.82 was authorized by the terms of the trust deed and by the evidence in the case.

Fourth. It is urged that the allowance of $3,000 to the complainant trustee as and for its reasonable solicitor's fees is grossly excessive. The allowance to complainant of a reasonable solicitor's fee is authorized by the terms of the trust deed, but the amount of the allowance in this case is excessive. The decree will be modified in that respect by substituting in lieu of such allowance the sum of $2,000.

Fifth. It is said the decree should not have provided for the allowance of $300 to cross complainant Grace R. Goldsmith for the fees of her solicitors. The allowance of a reasonable solicitor's fee to said cross complainant is authorized by the terms of the trust deed, and as no objection was taken before the master to the amount of such allowance appellant is not in a position to urge objection thereto on appeal. Gehrke v. Gehrke, 150 Ill., 166.

Sixth. As the finding in the decree that appellant was the equitable owner of the equity of redemption is not challenged in the assignment of errors, it is unnecessary to determine the propriety of the further finding in the decree that the third mortgage of $1,500 which was and is owned by appellant was merged in the fee.

Seventh. It is conceded by appellant that the defense of usury is personal to the debtor and can not be availed of by a junior lien claimant against a prior lien claimant. The question, therefore, whether an allowance of $4,500 to the Jennings Company as commission for procuring the negotiation of the bond issue was usurious is not properly before us for review.

Eighth. The decree finds and adjudges that as to the bonds owned by Grace R. Goldsmith appellant was the undisclosed principal of Mandel Frankel, and that appellant was thereby obligated to pay said bonds together with interest. This finding and direction in the decree is predicated upon the prayer of the cross bill filed by the cross complainant Goldsmith.

The trust deed and bonds secured thereby are executed under seal by Mandel Frankel under the name of Maurice Franklin. Cross complainant Goldsmith contends that Frankel having executed said bonds as the authorized agent of appellant, the latter is personally liable for the payment of said bonds as an undisclosed principal.

In Walsh v. Murphy, 197 Ill., 338, it is said:

"The rule in regard to instruments under seal made by an agent is, that in order to bind the principal and to make it his contract it must purport on its face to be his contract and the seal must purport to be his. An agent cannot ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself of such a contract and sue the other contracting party thereon. An undisclosed principal whose authorized agent has made such a contract in his behalf can neither sue nor be sued on it. (Story on Agency, secs. 147-154, 160; Bishop on Contracts, secs. 426, 1070; 1 Parsons on Contracts, - 9th ed. - 54, 468; Anson on Contracts, 348; Dicey on Parties to Actions, 154, 253; 1 Am. & Eng. Ency. of Law, - 2nd ed. - 1032.)"

This doctrine was later approved in Hostrup v. Frendergast, 179 Ill., 553.

There is no conflict between these cases and Daugherty v. Heckard, 189 Ill., 239, where the contract in question was signed by one person, a principal, and it was held that parol evidence was competent to show that the contract was that of a partnership, and that the firm entered into the contract in the name and style of the individual who signed. If the contract there involved had been signed by an authorized agent, instead of one of the principals, the case would be in point.

The decree was erroneous in the respect mentioned and will be modified by striking therefrom the following:

"And on motion of said cross complainant Grace R. Goldsmith, the court further finds from the evidence and from said Master's report that said Herbert W. Duncannon was the equitable owner and holder of the title to the real estate in this decree and in said Master's Report mentioned, and that Mandel Frankel who executed the trust deed and the bonds hereinbefore mentioned under the alias of Maurice Franklin, held only the legal title to said property, that as to the

bonds herein found to be owned by said Grace complainant Grace R. Goldsmith, said Herbert W. Duncanson was the undisclosed principal of said Mandel Frankel who executed said trust deed and bonds under the alias of Maurice Franklin, that as to said bonds Numbers 181, 182 and 183 held and owned by Grace R. Goldsmith, said Herbert W. Duncanson is individually obligated to pay the same, together with any and all interest that may be due thereon and all other sums by the decree found to be due said Grace R. Goldsmith."

Other questions raised have been fully considered, but are not deemed of sufficient consequence to merit further discussion.

The enforcement of the substantial rights of the parties most seriously affected by this foreclosure proceeding, being those who acquired the bonds in good faith as an investment, demands that this prolonged litigation be now finally terminated.

The decree will be modified in the respects heretofore fully set forth, and as so modified will be affirmed. One-fourth of the costs of this appeal will be paid by the Chicago Title & Trust Company and three-fourth of said costs will be paid by appellant.

DECREE AFFIRMED AS MODIFIED.

...rm, 1122. No.

1145

22 - 18317.

187 I.A. 389

MICHAEL LAURIE, Plaintiff in Error,	}	ERROR TO
vs.	}	SUPERIOR COURT,
BARBER ASPHALT PAVING COMPANY, a corporation, etc., Defendant in Error.	}	COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant in error recovered a judgment in the Superior Court of Cook County against plaintiff in error, Michael Laurie, in a suit by the latter for personal injuries alleged to have been caused by the negligence of the former.

Plaintiff in error was a member of a gang of men employed by defendant in error, Barber Asphalt Paving Company, as laborers, in the repair of asphalt pavements in the streets of Chicago. The gang consisted of laborers, of whom plaintiff in error was one, and two drivers, in all 12 to 14 men, and all of them working under the immediate control and direction of a foreman named Reed. The laborers, tools and materials were transported from place to place as occasion required in two dump wagons driven by the drivers. Upon the completion of any certain piece of repair work it was the custom of the laborers to load the materials and tools in the wagons and then get in themselves. The drivers would then drive the wagons to the next place to be repaired as directed by the foreman, and the wagon in front would be stopped at one side of the new place to be repaired, and the rear wagon would halt at the other side. The men would then get off the wagons and the drivers would dump the materials from the wagons to be handled by the laborers. On the day in question after the conclusion of a job of repairing at 26th and Wallace streets, the gang was being driven to 32nd and State streets

to the next job with the foreman seated beside the front driver and a number of the laborers seated inside the wagon box, and the plaintiff in error and another laborer were sitting on some boards that extended out from the bottom of the front wagon back and beyond the rear axle with their legs swinging down. When the front wagon reached the place where Read had directed the drivers to stop, the front wagon was suddenly halted while the rear wagon continued on with the result that the pole of the latter wagon struck and broke the leg of plaintiff in error.

The first count of the declaration charges that the injury to plaintiff in error was caused by the negligent order of the foreman to the front driver to stop his wagon.

The second count alleges that he was injured by the negligent and careless driving of the said drivers and that they were not his fellow servants.

The third and last count avers that he was injured by the negligent and improper driving of the rear driver and that he was not a fellow servant of plaintiff in error.

The court at the conclusion of all the evidence in the case directed a verdict of not guilty as to the second and third counts of the declaration, and this ruling of the court is assigned and argued as reversible error. Plaintiff in error was one of the working force and had been for sometime, and with the other laborers was hauled from place to place by the drivers who were also a part of that working force and engaged in the same general duty, repairing asphalt streets. They were all the servants of the common employer, and were all actually engaged in their work when the injury occurred, although they were being transported from the last place repaired to the next one to be repaired. The wagons and drivers were used specially for the work in hand and for no other

purpose, although transporting men, tools and materials and loading and unloading the same was the only duty of the drivers in connection with the work of repairing streets. The duties of the laborers were distinct from those of the drivers, but it required the work of both the laborers and the drivers to accomplish the work in hand; and their services were not such as to exempt them from the operation of the general rule that servants of a common master engaged in a common enterprise and working together under the same foreman are to be regarded as fellow servants. There was no dispute about the facts above recited, and the court properly held as a matter of law that they were fellow servants and that there could be no recovery in this suit by plaintiff in error by reason of their negligence. C. & A. R. R. Co. v. Keefe, 47 Ill., 108; St. L. A & T. H. Ry. Co. v. Britz, 72 Ill., 256; Abend v. T. H. & I. R. R. Co., 111 Ill., 202; Emery v. I. C. R. R. Co., 149 Ill. App., 353; Klinck v. Chgo. City Ry. Co., 208 Ill., 280; Chicago City Ry. Co. v. Leach, 208 Ill., 198; Chicago & E. I. v. White, 209 Ill., 184.

Plaintiff in error's contentions that the court erred in giving to the jury instructions numbered 9, 11 and 13 are untenable. It is the well settled law of this state that a plaintiff can not recover for an injury caused by the negligence of the defendant, if the evidence shows that the plaintiff at the time of his injury was in any way negligent and that such negligence contributed to the resulting injuries for which suit is brought. Wierzbicky v. Ill. S. Co., 94 Ill. App., 400; Chgo. City Ry. Co. v. Conevin, 72 Ill. App., 81.

No person can be said to be in the exercise of ordinary care for his own safety if he has been guilty of any negligence which contributed in any degree to his injury. If plaintiff in error's negligence in any way contributed to his injury,

his negligence may be said to be a proximate cause of his injury.

Instructions 11 and 13 are based on the evidence, are applicable to the case, and are not subject to any of the objections raised to them.

Under the evidence in this case the jury were warranted in finding that plaintiff in error was voluntarily riding outside of the wagon box in question in an exposed position to the danger that caused his injury, and against the instructions of the foreman and without his knowledge, and without any necessity or excuse for so riding, and that thereby plaintiff in error was guilty of contributory negligence.

There is no reversible error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

1146

108 - 18556.

187 I.A. 390

L. R. VAN ALLEN,
Defendant in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant in error, a traveling salesman, and manager of the Chicago office of Rogers-Pyatt Shellac Company, on July 9, 1911, at St. Paul, Minnesota, addressed to the Stoddard Hotel, LaCrosse, Wisconsin, and delivered for transmission to plaintiff in error, the following telegram:

"If any mail or telegram for me there now, please forward to St. Paul, care Frederic Hotel, to arrive before four P. M. July 10th. After that hold."

In the course of transmission the word "Frederic" in the telegram was changed to "Filday", with the result that defendant in error failed to receive his mail in St. Paul. He afterwards brought this suit in assumpsit to recover his damages for his loss of time and for expenditures alleged to have been caused by reason of said error. On the trial before the court without a jury he obtained a judgment against plaintiff in error for $58.60, and Western Union Telegraph Company prosecutes this writ of error to reverse the judgment.

The record discloses that the court allowed to defendant in error for his damages $40.00 for two days loss of time, and $18.60 for expenditures made by him in his efforts to secure his mail. The evidence was not sufficient to warrant the court in allowing the $40.00 for loss of time, even if it be conceded that defendant in error did lose two

days time by reason of the error committed by plaintiff in error, for the reason that it does not appear what his daily earnings were. He testified that he worked for his firm on a straight commission basis, and that his agreement with his company required him to produce a certain amount of business in his territory, and that his company placed to his credit $600 a month, which covered his commissions and his expenses. He also testified that in case his commissions did not amount to $600 a month he would not be required to return any part of the $600 per month as he understood his contract. The substance of his evidence then is that his salary and expenses, together, amount to $600 per month, but it is not made to appear how much thereof constitutes his earnings, or how much thereof constitutes his expenses. There is no evidence in the record tending to prove that he would or could have earned more than the $600 per month paid him by his firm. Hence, as he would receive $600 per month in any event, the evidence really shows that for the two days loss of time his damages would be nothing, either for loss of salary or for expenses, unless the negligence of plaintiff in error caused him more expenditures than he would otherwise have made. While it was the duty of defendant in error to transmit the message correctly as delivered, still its liability for its failure so to do, was the actual damages occasioned to plaintiff in error by reason of its breach of the contract. Tyler, U. & Co. v. W. U. T. Co., 60 Ill., 421; W. U. T. Co. v. Pushing Co., 188 Ill., 366.

For the same reasons above set forth defendant in error was not entitled to recover his expenses during the two days he spent in St. Paul, to-wit: $1.50 for a room the night of July 9th, $3.00 for a room in Minneapolis the night of July 10th, and $3.00 incidental hotel expenses and $7.50

expenses outside of the Hotel for said two days. The evidence clearly discloses that he would have stayed in St. Paul until four o'clock P. M., July 10th, even if his mail had been promptly received at the time named in his first telegram, and it does not appear from the evidence that he would not have gone to Minneapolis had he gotten his mail promptly at St. Paul. In other words, it does not appear from the evidence that his failure to receive his mail July 10th was the cause of any of the above named expenses. The burden of proof was on defendant in error to show that he was damaged, and what his damages consisted of, and he could not recover for any expenses not shown to have been occasioned by the erroneous telegram.

We think, however, that the evidence shows that he was entitled to recover $8.37 from the plaintiff in error for the other items of expenses named in the testimony of defendant in error, to-wit: $4.50 for expenses at LaCrosse, including his hotel bill, and incidental expenses there, and 37¢ paid by him for his second telegram; also $1.00 for telephone expenses and $3.40 for railroad fare from St. Paul to LaCrosse on July 11th. The evidence showing that these items of expense constituted his damages by reason of the mistake in the first telegram is found in the testimony of defendant in error, the only witness in the case, and is, in substance, that as salesman and manager of his firm his duties required him to work both in the house at Chicago, and on the road; that on July 10th and 11th he called frequently at the Frederic Hotel in person and by telephone to find out if his mail had arrived, and also went to the post office at St. Paul to find out if any mail had come for him; that on the morning of July 11th he returned from Minneapolis to St. Paul, and on learning that no mail was there for him, he went by railroad to LaCrosse to find his mail, and at the hotel there was shown the erroneous

message and informed that his mail had been forwarded and addressed to him at "Filday Hotel", St. Paul; that he then wired to St. Paul, asking that his mail be forwarded to him at Chicago, and on July 18th went to Chicago by rail and went to work for his firm at their place of business where he obtained his lost mail; that he did not know prior to going to LaCrosse that he could have found a cheaper way to locate his mail than by train, and had no notice in what shape his first telegram was received; that his original route as planned carried him to LaCrosse, and that was the reason he expected mail there; but that he transacted no business at LaCrosse and would not have gone there had he received his mail at St. Paul.

It is suggested by plaintiff in error that defendant in error could have lessened his damages and that it was his duty to do so, by wiring to LaCrosse from St. Paul to find out about his mail, and that when he went to LaCrosse, it would have been cheaper to have returned to St. Paul and have gotten his mail there than to have waited at LaCrosse to wire to St. Paul and pay his expenses at the hotel in LaCrosse. In the first place, it is not shown by the evidence that it would have been cheaper to have wired from St. Paul, and have waited there on expenses to find out about his mail, as it would all depend on railroad connections, and whether or not his return from St. Paul to Chicago would have carried him by LaCrosse anyway. He was not in a position to tell what to do anyway as he had no notice of the mistake in the telegram, and no notice that he in fact had any mail at LaCrosse to be forwarded. Under such a dilemma he was justified in going to LaCrosse as originally routed. It turned out that his going was simply a useless trip at the extra expense aforesaid, occasioned by plaintiff in error's breach of its contract to correctly deliver

his message. While it was his duty to make reasonable efforts to render his injury as small as possible, we do not think the evidence warrants the conclusion that he did not so do. The burden of proof was, also, on plaintiff in error to show that a different line of conduct upon the part of defendant in error would have reduced his damages as it claimed. Earth F. & F. Co. v. W. U. Tel. Co., 70 Ill. App., 275.

As the evidence indisputably shows that defendant in error was entitled to a judgment against plaintiff in error for $8.98, the judgment for that amount will be affirmed, provided defendant in error within ten days from the date of the filing of this opinion will enter a remittitur in this cause of $49.68. In case such remittitur shall not be so entered, the judgment of this court is that the judgment of the lower court is reversed and the cause remanded.

AFFIRMED FOR $8.98, IF REMITTITUR FILED; OTHERWISE REVERSED AND REMANDED.

7/6/14. Res N Rem

317 - 18781.

187 I.A. 405

MARIE A TOLLAR, administratrix de bonis non with the will annexed of the estate of AUGUST BREJCHA, deceased,
Plaintiff in Error,

vs.

BOHEMIAN BUILDING AND LOAN ASSOCIATION,
Defendant in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Marie A. Tollar, as administratrix of the estate of August Brejcha, deceased, prosecutes this writ of error to reverse the decree of the Circuit Court dismissing her bill of April, 1906, for want of equity and adjudging that she pay the costs of the suit in due course of administration.

The bill is a general bill for an account averring, in substance, that August Brejcha died in Chicago about December 5, 1903, leaving a will which was duly admitted to probate by the Probate Court of Cook County, and that letters testamentary were issued to plaintiff in error upon the estate of said deceased; that prior to April, 1901, said August Brejcha was a member of the Bohemian Building and Loan Association, defendant in error, and from thence to April, 1901, was its treasurer, and continued as a member thereof until his death; that defendant in error is an Illinois corporation organized to build and improve homesteads and to loan money to its members; that at divers times from February 3, 1893, to August 14, 1899, said Brejcha became the owner of various shares of stock of said association aggregating 386 shares, upon which he paid large sums of money, and that several thereof that were unpledged for loans, and several thereof that were pledged for loans to him, were declared by defendant in error to be matured, and that upon all of said shares by reason of pay-

ments thereon by said Brejcha large sums of money became due to him which defendant in error neglected to pay or to account to him therefor; that while such treasurer said Brejcha advanced large sums of money to defendant in error to pay for matured shares to other of its members, and signed and paid twenty notes for it by which it secured other large sums amounting to more than $40,000, none of which sums have been paid or accounted for to him by defendant in error; that defendant in error charged him with shortage as such treasurer, and caused him to pledge to it 56 shares of stock, and to mortgage certain real estate to secure said alleged shortage, and applied all of said moneys owed to him to discharge the alleged shortage, while as a matter of fact there was no such shortage and on a fair accounting defendant in error would have been found owing him a large sum over all its just claims against him which sum it refused to pay or to account therefor to him, and that it has frequently refused to account to plaintiff in error therefor; that plaintiff in error is not fully advised as to all such matters, but that defendant in error has books of accounts and documents in its possession by which all of said matters may be made to fully and clearly appear, and plaintiff in error prays for such accounting and discovery, etc., by defendant in error.

By its answer defendant in error admitted that Brejcha was one of its members and its treasurer and that it issued to him divers shares of its stock, as charged, but denied that Brejcha borrowed for it, or advanced to it, large sums of money or any sum of money, or that it owed him any sum whatever. Alleged that he signed certain of said notes as its treasurer and paid them with its funds, and denied that it never accounted to him as to any or all of said matters in said bill mentioned. Averred that after a bill for such ac-

counting had been filed by said August Brejcha against defendant in error in said court, on January 24, 1901, there was a full and complete account taken of all of said matters by him and defendant in error, and that the same was agreed upon by them as a true account and settlement of all maters between them; that on May 9, 1901, defendant in error filed its certain bill of complaint in the Superior Court of Cook County against said Brejcha and others to foreclose a certain trust deed executed by him to secure a certain loan to him on fourteen of said shares, and that he appeared and answered said bill, and that in the course of said foreclosure suit, the amount due on said loan was ascertained, and that said accounting was by agreement of said Brejcha and the complainant in foreclosure proved to be a full and true accounting of all such matters between them other than said mortgage, and that said Brejcha was credited with all matters found to be due him on such accounting as a set-off against the amount due to defendant in error on said mortgage, and that a decree was rendered in such foreclosure suit for a balance due the complainant therein, and for such balance decreed to be due the real estate mortgaged was sold, and that therefore thereby said account was adjudicated and finally settled and paid, and said bill for an accounting by said Brejcha was upon his own motion, after such accounting and settlement, dismissed by the Circuit Court.

A general replication was filed by complainant to said answer without amending or asking leave to amend her bill.

The court properly ruled on the hearing that the issue of an account stated and adjudicated and paid should be first determined before any account between Brejcha and defendant in error could be inquired into or stated. An account stated and paid is a bar to any relief whatever on a bill for a general accounting in which no particular errors are assigned

in the account stated. 1 Beach on Modern Equity Practice, 535; Read v. Small, 7 Paige (N. Y.), 573; The State v. I. C. R. R. Co., 246 Ill., 188.

The fact that by its answer defendant in error also admitted many of the allegations of the bill and denied other allegations thereof, or that the bill prayed for discovery and the production into court of certain books and documents of defendant in error, furnishes no ground for complaint at such ruling. If all the accounts had been stated and paid by the parties a general bill for an accounting could not be maintained by either party for the very simple reason that no one can maintain a bill in equity for relief that he has already obtained before the filing of his bill. No party complainant to a bill for a general accounting will be permitted to show mistakes or errors in the stated account where there are no allegations in the bill of any such mistakes or errors. See same authorities above cited.

The evidence of A. Purer, a wholly disinterested witness who was the agent of August Brejcha in the making of the settlement of the accounts between Brejcha and defendant in error, was taken upon the hearing; and his evidence amply sustains the plea of defendant in error of an account stated between the parties, and that that statement of the account was introduced as a part of the evidence upon which the said decree in foreclosure was rendered. It is unnecessary to discuss the evidence of this witness as it was not in any way controverted by other evidence. His testimony was, in substance, that all matters between Brejcha and the defendant in error, upon which an accounting was prayed for in the bill of complainant in error, were gone over and considered in the stating of the account, with Brejcha present a part of the time, and that he was satisfied with it and instructed Purer to settle the matters with defendant in error in accordance

therewith. It is further shown by the record that after the accounts were so stated, by stipulation of Brejcha his own bill for an accounting was dismissed, his answer in the foreclosure suit withdrawn, and the statement of the accounts was introduced in the foreclosure suit as evidence and all matters between the parties were settled and disposed of finally in the decree in foreclosure.

For the reasons already stated it will not be necessary to further consider the arguments of plaintiff in error, that the admission that Brejcha was a stockholder entitled her to an accounting, that the alleged settlement with Brejcha was incomplete, that a stated or settled account can be shown to be erroneous, that the decrees in former suits offered in evidence were not a bar to this suit because they did not include all the items mentioned in the bill, and that therefore the cause should have been referred to a master in chancery to take the account. Without an amendment to the bill alleging specific mistakes or errors in the account stated by reason of fraud or mistake the accounts could not be opened up and restated. The State v. I. C. R. R. Co., supra.

It is also insisted that the witness, William Casper, a stockholder of defendant in error, was incompetent to testify against plaintiff in error as administratrix. While that is true, it is not reversible error, because the other undisputed competent testimony in the record clearly supports the decree of the court, and the testimony of Mr. Casper was merely cumulative evidence and may be entirely disregarded in the consideration of the case.

It is further insisted by plaintiff in error that the decree should be reversed for the reason that the court erred in denying her leave to file an amendment to her bill after all the evidence was heard by the court. The record in this case does not show any motion or any attempt whatever to amend

the bill as claimed by plaintiff in error outside of the certificate of evidence signed by the judge.

"All oral motions in a chancery cause should be and are supposed to be noted upon the clerk's docket and a minute thereof made by the judge himself, and the motions, together with the orders made thereon, should be duly entered of record by the clerk in making up his orders in the cause. By this means they become a matter of record, without the aid of a judge's certificate or bill of exceptions.*****The sole office or function of a certificate of evidence in chancery causes, as its very name implies, is to truly set forth the evidence offered, rejected, received and considered on the hearing, and any attempt to make it subserve some other purpose is without warrant of law." Flaherty v. McCormick, 123 Ill., 535; South E. H. U. C. v. The Oakwoods Cemetery Assn., 200 Ill., 480.

If, however, plaintiff in error was in a position to insist that the record properly discloses such motion to amend her bill, and the court's refusal to allow the same, such refusal would not be error. The alleged proffered amendment consisted merely of allegations that at various times from 1881 to 1900 Brejcha advanced and paid out various sums of money for defendant in error which were not taken into consideration in the alleged settlement; and that while he was its treasurer he signed and paid out of his own moneys various notes for defendant in error and that those items were not considered in said alleged settlement of accounts. There is no allegation whatever in the proposed amendment to the effect that said matters had not been repaid previous to the stating and settling of the accounts in 1903, or that anything was due to Brejcha or to his estate at the time said amendment was offered by reason of said payments by Brejcha, and no allegation whatever was made to the effect that said items

were omitted from said settlement by reason of fraud or mistake. While an account stated and settled may be impeached for fraud or mistake in a court of equity, it can only be done upon a bill distinctly and clearly setting forth the specific errors with distinct averments as to the time when the fraud, mistake, concealment or misrepresentation that caused such omissions, was discovered and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been earlier made. Plaintiff in error's alleged amendment was wholly insufficient to entitle her to any further consideration by the court. The State v. I. C. R. R. Co., supra.

There is no reversible error in this record and the decree is affirmed.

DECREE AFFIRMED.

arch Term, 1913, As.

11 - 18747.

187 I.A. 410

RICHARD H. SWARTWOUT and PAUL APPENZELLAR, for the use of G. P. SAYERS,
Plaintiffs in Error,
vs.
THE WALWORTH & NEVILLE MANUFACTURING COMPANY, a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Suit was begun in the Municipal Court by plaintiffs in error, Richard H. Swartwout and Paul Appenzellar, for the use of G. P. Sayers, against the Walworth & Neville Manufacturing Company, a corporation. As near as can be inferred from the record and argument of counsel, Swartwout and Appenzellar were partners engaged in dealing in or at least in purchasing short time commercial paper. Their main office was in New York. They had an office in Chicago of which one Frederick A. Yard was manager. Defendant in error was apparently, judging from the name, a corporation, presumably in some manufacturing business in or near Chicago. In October, 1907, defendant in error was in financial difficulty. It had notes maturing which by reason of prevalent conditions it could not raise the cash to liquidate. Plaintiff in error had within two years purchased a number of these notes. Whether they still owned them does not satisfactorily appear. A Mr. Carpenter, the treasurer of defendant in error, called on Mr. Yard, the manager of the Chicago office of plaintiffs in error, and advised him of the situation and conferred with him concerning the best course to pursue. A number of persons, most of them representing different creditors of defendant in error, were at the request of its officers, formed into what was called a creditors' committee, and were

made directors and officers of the corporation. Yard was one of them. Plaintiffs in error were not consulted about his being made one of the committee, but they were advised of the fact that he so acted and of what he did. He was made treasurer. This committee conducted the business of defendant in error for a time, and were paid for their services $3,000 each, excepting Yard. He received $150 per month for the time he was so employed, and a note for $3,000, which he later returned to defendant in error. Before this note was given Yard, his connection with plaintiffs in error had been severed. Whether the note for $3,000 was paid or surrendered without consideration the record does not disclose. This suit was begun to recover the $3,000 represented by the note that was returned, on the theory that plaintiffs in error were the undisclosed principals in the transaction. There was a directed verdict for the defendant.

Not every act done and every contract made by a person who is the agent of another, wholly disconnected with the line of the agency can be adopted and enforced by the principal. If while one is the agent of another he spends his time serving others or in making contracts of his own disconnected with the line of his employment, the principal may have an action against the agent, but there is no privity between the principal and those with whom the agent deals in independent matters that will warrant an action in the name of the principal based thereon. To warrant an action by an undisclosed principal based on a contract made by the agent, it must appear (1) that the contract was made on behalf of the principal, (2) that there is a mutuality in the contract between the principal and the one who deals with the agent, so that the contract can be enforced against the principal when he is discovered, and (3) that the principal has the right to perform the contract.

The evidence conclusively shows that the service rendered by Yard was a personal service on his part; that his being made a member of the committee was due to a personal friendship between him and Carpenter, the treasurer of defendant in error, and a personal confidence reposed by Carpenter in his ability; that no compensation was agreed to be paid for the service rendered. On that state of facts plaintiffs in error could under no circumstances have been held liable if Yard had failed to act on the committee or for any act of his while a member thereof.

There is nothing in this record warranting a recovery by plaintiffs in error as undisclosed principals.

The rulings of the court on the admission of evidence and other questions presented during the trial, and the giving of the peremptory instruction were all in accord with the views here expressed.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

360 - 18687.

115

187 I.A. 411

THOMAS NOGAL,
Appellee,
vs.
INTERNATIONAL HARVESTER COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellee obtained a judgment in the Superior Court for $1,250. There were three counts in the declaration. In the first count it is charged that appellant furnished to appellee who was the servant of appellant to use in his work a ladder that was broken and defective. The second count charged that appellant negligently failed to make a reasonable inspection of the ladder, which inspection would have disclosed that it was broken and defective, and the third count charged that appellant failed to use ordinary care to discover defects in the ladder and failed to warn appellee of defects in the ladder of which it had, but of which appellee did not have, notice. To these counts a plea of general issue was filed.

Appellant at the close of the evidence of appellee and also at the close of all the evidence presented its motion for a peremptory instruction to find the defendant not guilty. In each of those motions it was specifically pointed out that the evidence disclosed that appellee assumed the risk of the injury. The denial of these motions is assigned for error.

The basis of appellant's contention on that assignment of error is that the ladder in question was a simple and ordinary tool, the nature of which is easily understood, and that in the use of such tools the servant is conclusively presumed to assume the risk of all defects therein, whether patent or latent, and whether the master knows of such defects

or could have known of them by the exercise of reasonable care or not. In this contention appellant is undoubtedly correct. The evidence offered by appellee shows that the injury was caused by the breaking of the ladder in question; that it was an ordinary wooden ladder; that appellee had used ladders like the one in question for years while working for appellant and while doing the same kind of work that he was doing when he was injured; that he had used the identical ladder in question for more than two hours just before he was injured; that he had carried it about the shop, placed it in position and climbed up and down upon it and observed it; that he knew its dimensions and the size of the rungs and side pieces; that he had noticed that it was dirty, but not at the point where it broke, and that it was not painted. In other words, the evidence of appellee shows the ladder in question was a simple ordinary tool; that he was familiar with ladders in general and with the particular ladder in question, which he had had in his possession long enough to be familiar with, as distinguished from one placed in his hands for immediate and hurried use. Aside from the evidence, it is a matter of common knowledge that there is scarcely an implement more simple or with which all persons of whatever age or occupation are more familiar than a ladder.

It is not an open question in this state that a servant who uses a tool of that kind under the circumstances in which this ladder was used assumes the risks of all defects therein. In Webster Mfg. Co. v. Nisbett, 205 Ill., 273, the court said:

"In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can

be regarded as making out a case of liability within the rule laid down.*****

"The rule which exempts an employee from assuming the risk*****is designed for the benefit of those engaged in work where machinery and materials are used of which the employee has little knowledge, but it does not apply to ordinary labor, which only requires the use of implements with which the employee is entirely familiar."

In Consolidated Wire Co. v. Maxwell, 116 Ill. App., 396, the court said:

"Where, from the simple construction of the appliance, and the familiarity of the servant with its use, there is no reason for presuming the master knows or could have known more of the dangers arising from its use than the servant, the rule that the servant is exempt from the assumption of the risk does not apply, even though the master has notice of the defect and has promised to repair."

In Schumann v. International Harvester Co., 174 Ill. App., 140, the court said:

"The doctrine in this state is that from an injury received from the use of a simple tool, the master is not liable, even if he has notice of the defect, and, therefore, the servant assumes the risk of injury from its use."

Appellee insists that the servant does not assume the risk of dangers arising from the master's neglect to perform a duty imposed by law. Support for that contention is found in Alton Paving Brick Co. v. Hudson, 176 Ill., 270; City of LaSalle v. Koetka, 190 Ill., 130; Kierot Coal Co. v. Black, 197 Ill., 314; Black v. Harris, 200 Ill., 96. The proposition needs qualification. In Klofski v. Railroad Supply Co., 233 Ill., 146, the court says:

"The master's negligence is not an ordinary and usual risk of the employment, hence the servant does not assume dangers arising therefrom by his contract of hiring, but the servant knowing of such negligence may assume the risk and in such case he assumes it because he knows of it, and not because it has become an ordinary one."

In Cichowicz v. International Packing Co., 206 Ill., 346, the court says:

"To say that the servant assumes no risks, except such

so can not be obviated by the adoption of reasonable measures of precaution by the master is to abolish the doctrine altogether."

In I. C. R. R. Co. v. Fitzpatrick, 237 Ill., 478, the court says:

"In such cases (where the servant has full knowledge of the danger) it is wholly immaterial that the defect exists as the result of gross negligence on the part of the master. The instruction under consideration, which told the jury that the servant did not assume the risks arising from the master's negligence is not an accurate statement of the law as applied to the facts in this case."

In Klofski v. Railroad Supply Co., 235 Ill., 148, the court says:

"In respect to such dangers (dangers of which the servant has full knowledge) it is wholly immaterial whether they arise from the negligence of the master or from other causes."

In Kath v. East St. Louis Suburban Ry. Co., 238 Ill., 186, it is said:

"This instruction was clearly wrong, in that it informed the jury that the deceased did 'not assume risks due to the master's own negligence,' as the authorities uniformly hold that an employe assumes all risks connected with the business in which he is employed of which he has notice, even though they are produced by the negligence of the master, if he continues in the employment."

Regardless of the distinctions made by the two lines of cases above referred to, the rule sought to be invoked here by appellee has no application for the reason that there is in this case no proof of a neglect of any legal duty on the part of the master. Even on the theory that it was the duty of the master to inspect the ladder and use such care to see that it was reasonably safe as the law requires of the master in dealing with intricate machinery, there is no competent proof in this record of a neglect of such duty. Neither is there any proof that the ladder was not reasonably safe, beyond the fact that it broke, and appellant concedes that the doctrine

of res ipsa loquitur has no application to the facts in this case.

It is further contended by appellee that as appellant asked the following instruction: "You are instructed by the court that it is not the duty of an employer to furnish a servant an absolutely safe tool or appliance with which to work, but it is his duty to use ordinary care to furnish the servant with a reasonably safe tool or appliance; and if you believe from the evidence in this case that the ladder, at the time it was furnished to plaintiff, was a reasonably safe appliance for the purpose for which it was used, then the plaintiff cannot recover in this case, and you should find the defendant not guilty"; it can not now be heard to say it was not the duty of the master to use ordinary care to furnish the servant with a reasonably safe ladder, or, in other words, that appellant has by procuring that instruction to be given, committed itself to the proposition of law therein contained, as the law in this case, and can not now recant therefrom.

If the defense had been based wholly on that theory of the law and the court had been induced by appellant to so rule, there would have been force in this contention, but such is not the case. The theory of the defense was that the ladder was a simple tool and that there was no duty of inspection placed on the master as to simple tools, and no duty to use care to see that the ladder was reasonably sound and safe, and that theory was persisted in, and insisted on, until the court by denying the peremptory instruction asked by appellant, compelled it to either adopt the theory of the court or abandon all further defense of the case. The law is well settled that after an adverse ruling on the motion for a peremptory instruction, to which exception is duly preserved, a defendant may proceed with his defense on the theory of the law adopted by the court without waiving his right to have the rulings of the court thereon reviewed on

appeal. Wallner v. Chicago C. Traction Co., 245 Ill., 148-153; Wolf v. Chicago Sign Painting Co., 233 Ill., 301-304; Chicago T. T. R. R. Co. v. Schiavone, 216 Ill., 275-278; I. C. R. R. Co. v. Swift, 213 Ill., 307-313; Chicago Union Traction Co. v. O'Donnell, 211 Ill., 349-350.

The judgment of the Superior Court is, therefore, reversed with findings of fact to be incorporated in the judgment of this court.

REVERSED WITH FINDINGS OF FACT.

FINDINGS OF FACT:

We find as ultimate facts that the injury complained of was not caused by the negligence of appellant and that appellee assumed the risk of the defects in the ladder in question and of the dangers arising from its use.

Form, 1920

425 - 18893.

187 I.A. 413

J. J. CAHILL,
Appellee,

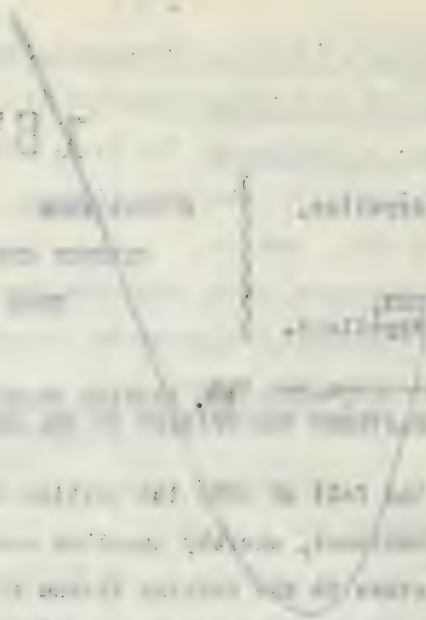
vs.

GEORGE B. DRYDEN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

In the fall of 1920 the parties to this suit entered into an oral contract, whereby appellee was to furnish and install regulators to the heating system in the residence and garage of appellant for the sum of $378. The work contracted for was soon completed and extra work was done and material furnished to the amount of $39.01 by appellee for appellant, so that the bill amounted to $417.01. Appellant paid on this bill $337, and refused to pay $80.01, because he claimed one of the regulators failed to perform the functions for which it was designed, and finally disconnected it from the heating system. Appellee made several inspections of the regulator in question before it was disconnected with the heating system, and becoming satisfied that it was all right and worked properly, brought this suit before a justice of the peace in Cook County, where he obtained a judgment for $80.01, the unpaid balance of the bill. Appellant appealed from that judgment to the Circuit Court, where it was tried before the court without a jury, and resulted in a judgment for appellee for the same amount as the judgment in the justice court, and for costs in both courts. From that judgment appellant has appealed to this court. No propositions of law or findings of fact were presented to the court to be passed on. It must, therefore, be presumed that the court correctly con-



strued and applied the law. Appellant contends the judgment should be reversed because the finding is contrary to the weight of the evidence. His entire defense on the trial in the court below was that the regulator in question failed to regulate the heating plant in the residence.

The office of this regulator was to open and close dampers and openings in the furnace connected with the heating system. Regulating the temperature in a house where the heating plant is equipped with a regulator, takes time. It will not rise or fall immediately upon the dampers and drafts being changed by the operation of the regulator. The temperature is regulated by the amount of fire, the amount of the fire is regulated by the amount of fuel and draft, and the amount of draft is regulated by dampers and openings in and connected with the furnace.

The particular complaint made against the heating system while the regulator was attached to it was that the house remained too hot. The evidence on the part of appellant was furnished by the testimony of appellant and a servant. Appellant said: "I knew nothing about a regulator or how to operate one until after this was installed in my house and Mr. Cahill (the appellee) instructed me.*****The regulator in the house did not work.*****We tried for thirty days to get it to work and then disconnected it. If we set the dial of the regulator for a temperature of 70, we might get a temperature of 100.***** We never had a temperature of 100 degrees in the house*****I moved the dial and it brought no results.*****It is not a fact that the regulator raised or lowered the dampers on the furnace. ****** The servant testified: "*****The regulator kept the lower damper of the furnace always open and would cause too much heat in the house.****** Nothing more definite is stated by either of these witnesses as to when they observed the conditions testified to by them, or in what manner they or either of them tested the regulator or under what conditions their

observations were made or whether the failure of the regulator to operate the dampers or doors was due to a defect in the mechanism itself or to improper installation or to want of skill in its management. On the other hand, the appellee testified that he was experienced in the installation and operation of regulators; was familiar with the particular regulator installed; that it was a good regulator; that it was properly installed, and worked perfectly on every occasion except one, when he inspected it; that on that occasion he found that a certain pulley over which some chains connecting the regulator with the furnace ran had been pulled loose from the ceiling of the basement; that while this pulley was so disengaged from its proper place the regulator would not operate the doors and dampers; that he had the pulley refastened and that then the regulator operated all right; that he attempted to make an appointment with appellant to have the regulator inspected in his presence by a representative of the manufacturers of it, but that appellant refused to fix a date. There is nothing in this record to show that the instances, when appellant and his servant testified the regulator would not work properly, were not at the time the pulley in question was loose, or to show how the pulley became loosened. We think that every impartial and candid person reading this record must conclude that the testimony of appellee is entitled to more credence than that of appellant and his servant. If the testimony of appellee is to be believed, and the trial court evidently did believe it, the regulator was all it should be and appellant was properly adjudged to pay the bill.

On this record we are unable to say that the finding and judgment of the court was against the manifest weight of the evidence.

The judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

464 - 18935.

187 I.A. 414

JOHN F. DEVINE, Administrator of the Estate of FRANCISCO VALENZA, Deceased, Appellee,

vs.

RAFFAELE COTUNIO, Appellant.

APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Francisco Valenza died March 21, 1908. At the time of his death he was in partnership with one Guiseppe Montemuro in the saloon business, each owning a one-half interest therein. The evidence fairly tends to show that about one week after the funeral of Valenza, one Raffaele Cotunio, a foster brother, agreed to pay to the heirs of Valenza $500 for the interest of Valenza in the saloon business; that Montemuro, the surviving partner, and one Joe Valenza, a brother of Francisco, and his only heir in this country, consented to that arrangement, and that thereupon Cotunio conducted the saloon jointly with Montemuro as his partner, receiving one-half of the proceeds and paying one-half of the expenses thereof, until March, 1909, when he purchased the interest of Montemuro therein and thereafter conducted the same as the sole owner thereof. The $500 which Cotunio agreed to give the heirs of Francisco Valenza has never been paid. In September, 1911, John F. Devine, public administrator, was appointed administrator of the estate of Francisco Valenza and brought this suit to recover of Cotunio the $500 which he agreed to pay for the share of Francisco Valenza in the partnership business. After several unsuccessful attempts to form satisfactory issues by written pleadings, an order was entered by the trial court in pursuance to the stipulation of the parties,

that all pleadings proper to be pleaded should be considered as filed, and the cause was tried under that understanding. The jury found the issues for the plaintiff and assessed the damages at $500, and judgment was entered on the verdict. Cotunio has appealed from that judgment.

By the death of Francisco Valenza the partnership between him and Montemuro was dissolved. It thereupon became the duty of the surviving partner to proceed at once to settle up the partnership, and to account for the interest of his deceased partner. Andrews v. Stinson, 254 Ill., 111. That accounting could be made either in the Probate Court or directly with the legal representatives of the deceased partner. Andrews v. Stinson, supra. While the arrangement entered into between Montemuro, Joe Valenza and Cotunio, by which Cotunio took over the interest of Francisco Valenza in the saloon business and agreed to pay the heirs of Francisco $500 therefor, was not such an accounting as would relieve Montemuro from liability to the estate for the share of his deceased partner in the partnership property, if the representatives of the estate saw fit to hold him liable therefor, yet we think when such representative elected to ratify it and to hold Cotunio to his bargain, neither Cotunio nor Montemuro can be heard to say it did not amount to an accounting between the surviving partner and the representatives of the estate, or to deny Cotunio's liability on it to the estate. By it Cotunio possessed himself of the interest of Francisco Valenza in the partnership at a stipulated price. The proceeds of that partnership interest in law belonged to the estate. The legal effect of the agreement between the surviving partner, the brother of the deceased partner and the purchaser of the deceased partner's interest was that the agreed consideration therefor should be paid to the estate. The representative of the estate has ratified

the agreement by suing for the agreed consideration. The judgment is for the exact amount of the agreed consideration. No satisfactory reason has been urged and we are unable to conceive of any why the judgment should not stand. It is, therefore, affirmed.

JUDGMENT AFFIRMED.

477 - 13848.

FRED R. ROBERTS, Administrator of the Estate of EMIL E. WAEGNER, Deceased, Appellee, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

187 I.A. 415

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellee sues as administrator of the estate of Emil E. Waegner, deceased, and charges that Waegner was killed on December 18, 1910, in consequence of the negligent operation of appellant's trains. The deceased and others were at the station of appellant called River Grove station, located a short distance west of the City of Chicago, and near the Elmwood cemetery. He with the others there had attended a funeral at that cemetery that afternoon, and were at the station awaiting the coming of a train, which they intended to take to the city, and were provided with tickets for the trip. The tracks of appellant railroad there run in an easterly and westerly direction, the north track being used for westbound trains and the south track for east bound trains. The depot building is located on the north side of these two tracks. Persons desiring to board an east bound train were required to do so from a platform on the south side of the south track. The track to the west of the depot is straight for approximately 2,000 feet. After the funeral, Waegner and four or five other men of the party went to a saloon and each drank a bottle of beer and had a lunch. They then went to the depot grounds, but did not go into the depot building, but remained on the north side of the tracks and somewhat east of the depot building and platform. The train these people expected to take was due a short time before six o'clock, P. M. About fifteen minutes before this train was due a freight train approached

the station from the west, a whistle on the locomotive was sounded and the headlight was in plain view. Those persons who were then waiting at the station to go into the City mistook the freight train for the passenger train for which they were waiting, and called each other's attention to the fact that their train was coming. Waegner's attention was particularly called to the coming train. Those at the depot and on the north platform, including Waegner, proceeded to cross the tracks to the south side platform and practically all of the party succeeded in doing so in safety, although a few of those nearest to Waegner, observing the nearness of the approaching train, refrained from crossing. Waegner's attention was there called to the fact that if he crossed the track he must hurry. He, however, heedless of the warning, neither hurried enough to avoid being struck or desisted from attempting to cross, but went on the east bound track in front of the approaching engine, and was struck by it and killed. Of the twenty-five or thirty persons situated as he was, he was the only one who did not hasten across the track in time to be safe or refrain from attempting to cross.

As we view the case, no reasonable mind can doubt that Waegner failed to exercise such care for his own safety as any ordinarily prudent person situated as he was at and immediately before the time of the injury would have exercised or that his death was due to his own negligence.

The judgment of the Superior Court is, therefore, reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED WITH FINDING OF FACT.

FINDING OF FACT:

We find as an ultimate fact that the injury to appellee's intestate resulting in his death was due to his own negligence.

March Term 1914

20550.

187 I.A. 425

JOSEPH WEISSENRIEDER, Appellee,	}	INTERLOCUTORY APPEAL
vs.	}	FROM CIRCUIT COURT,
ANTHONY J. STUMPF, Appellant.	}	COOK COUNTY.

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellee filed his bill in chancery in the Circuit Court naming appellant and one William C. Heinemann as defendants. The prayer asks that on final hearing the defendants be restrained from "encumbering, disposing of or collecting or in any way transferring" a certain trust deed and certain notes described in the bill and for a mandatory order compelling them to surrender the same to complainant. Later, the bill was dismissed as to Heinemann, and an amended bill was filed against appellant alone, averring on information and belief that the deed and notes in question had been transferred by appellant to William C. Heinemann and by him to an innocent purchaser without notice and praying for an injunction restraining appellant from transferring, disposing of, assigning or encumbering certain real estate and certain shares in an incorporated company owned by him, and for an accounting. The bill as amended was presented to a chancellor who without notice to appellant and without requiring an injunction bond ordered a writ of injunction to issue restraining appellant and his agents, attorneys and assigns from "in any way disposing of, transferring, setting over, assigning or conveying or encumbering any of the real estate or personal estate of said Anton J. Stumpf until the further order of this court." From this order appellant has appealed. Appellee has not favored this court with any brief or argument.

The original bill was verified, but the amendment to it was not verified. The order for the injunction was based on the averments and prayer contained in the unverified amendment to the bill.

The averments of a bill in order to warrant an order for a temporary injunction without notice must be verified and verified positively. Board of Trade v. Riordan, 94 Ill. App., 298-309; Palmer Distributing Co. v. Noledi, 111 Ill. App., 502.

Moreover, there are no facts averred in the bill to warrant an injunction without notice or with notice for that matter. There is no showing that appellant is insolvent or that a decree for any amount found by accounting to be due appellee could not be enforced if the property was sold, or that the money derived from the sale of the trust deed and notes were invested in the property which appellant was restrained from selling, or that appellee's rights would be in any way prejudiced by the sale of the property.

For the reasons suggested the order for the temporary injunction is reversed.

ORDER REVERSED.

March Term, 1913, No.
283 - 1928

RAYMOND CONCRETE PILE COMPANY,
Appellee,

vs.

HARTMAN FURNITURE & CARPET COMPANY et al.,
On Appeal of HARTMAN FURNITURE & CARPET COMPANY, Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

187 I.A. 426

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

January 8, 1913, the Circuit Court of Cook County sitting in equity entered a decree in a cause entitled Raymond Concrete Pile Company vs. Hartman Furniture & Carpet Company, Augustus S. Peabody, Trustee, Falkenau Construction Company, Frederick A. Siebold and Henry Siebold, which decree first confirmed the report of a Master in Chancery to whom the cause had been referred, except as to an exception of the complainant in relation to the non-allowance of interest on the sum found due to it, and then found the material allegations of the amended bill of complainant in the cause true, and that there was due from the defendant, the Hartman Furniture & Carpet Company, to the complainant, the Raymond Concrete Pile Company, on November 20, 1910, "$7941.80 for balance of the contract price of $23,000 mentioned in said bill, and the further sum of $11,400 for extra piling put in at the request of the defendant upon the terms of $1.10 a foot provided in said contract, and the further sum of $245 for making tests and other extra work"; that all said sums were unpaid, and that the complainant was entitled to a mechanic's lien upon the premises mentioned in the bill for $21,647.40 (being the amount found due on November 20, 1910, with interest to the date of the decree); that a master's fee of $1000 and that a stenographer's charge of $229.30 were reasonable and should

be taxed as costs against the Hartman Furniture & Carpet Company.

The decree then declared a lien for $21,647.40 on certain lands in Cook County (which were described in the bill) with all improvements thereon, in favor of the Raymond Concrete Pile Company, ordered the Hartman Furniture & Carpet Company to pay within ten days the Raymond Concrete Pile Company the sum of $21,647.40 with interest, together with costs, and provided for the method of enforcing the lien by sale if the sum should not be paid. It also ordered cross-bills of the Hartman Furntiure & Carpet Company and the Falkenau Construction Company dismissed for want of equity.

From this decree the Hartman Furniture & Carpet Company appealed to this Court and this appeal is before us for disposition.

The appellant contends that the decree is unjust and contrary to the evidence; that the Raymond Concrete Pile Company was not entitled to a lien for any sum, not having completed in accordance with the specifications the contract set up in its amended bill, by virtue of the performance of which in the furnishing of the concrete piling for a warehouse on the premises described in the bill it claimed the lien. The appellant also maintains that if the complainant is entitled to any relief under its bill, and should have a money decree for any sum, there should be deducted from the amount found due in the present decree damages suffered by the Hartman Company by reason of the complainant delaying the completion of the contract beyond the time limit mentioned in it; that by one theory of computation, which appellant maintains is the correct one, these damages would be $10,080, and by another $4,144 - one of which sums at all events should be deducted from the $21,647.40

declared by the Court below to be due to the complainant. It is also insisted by the appellant that certain interest has been erroneously allowed by the decree.

The suit grows chiefly out of the diverse constructions of a contract between the defendant, the Hartman Furniture & Carpet Company, with the firm of F. A. Siebold & Son, under date of August 25, 1910, by which contract the Sieboldo undertook for certain considerations and in accordance with certain provisions to provide all materials and perform all work for the concrete piling and footings required for the erection of a seven story and basement warehouse on property of the defendant.

The Sieboldo immediately sublet the work under the contract to the complainant, the Raymond Concrete Pile Company, and before the filing of the amended bill in this case made an assignment to said Company of all their interest in the said contract and all claims against the defendant arising out of said contract or for any extra work or materials connected with the work under the same.

As found by the Master, the finding being uncontested here, "the Siebold firm dropped out entirely and the contract was undertaken * * by the complainant Company."

The contract, therefore, of the Siebold firm will be treated and spoken of herein as though made by the complainant Company, which will be denominated for convenience the "contractor", the Hartman Company being called the "owner."

The contract as executed had appended to it and by recital made part of it, 1st, drawings and specifications by the architects, and, 2nd, a "proposal" by the contractor,

which are in the order named logically first worthy of mention. The drawings agree with the specifications so far as the conditions can be shown by drawings, and may be disregarded in this statement. The specifications which affect the questions arising herein are as follows:

"IN GENERAL:

These specifications together with the drawings combined indicate the work to be done under this contract.

PILING:

The piling shall be done as shown on diagram (i. e. the drawings appended) for numbers and position and shall consist of the Raymond type concreted pile. These piles are to be twenty feet long with a head of twenty inches and to be six inches at the base.

CREDITS:

Should it be found that the piles cannot be driven for the full twenty feet length requiring more than fifteen blows of a No. 2 Vulcan steam hammer to secure one inch of penetration, a credit price per foot is to be allowed for all such deductions that may occur. For additional piles or additional lengths over twenty feet an extra is to be allowed.

Contractors shall state what the credit and extras will be per foot in his proposal."

The provision concerning the "15 blows of a No. 2 Vulcan steam hammer is important to note. It can only be made intelligible when the nature of the work is considered by reading into the clause the word "without", so that the provision shall be -

"Should it be found that the piles cannot be driven for the full twenty feet length <u>without</u> requiring more than fifteen blows of a No. 2 Vulcan steam hammer to secure one inch of penetration, a credit price per foot is to be allowed for all such deductions that may occur. For additional piles or additional lengths over twenty feet an extra is to be allowed.

Contractors shall state what the credit and extras will be per foot in his proposal."

That this gloss should be put on the actual language of the specifications becomes evident when the nature of the work to be done is thought of. The "Raymond concrete pile" is constructed and driven in this way: Over a steel shaft in the shape of a pile which can be enlarged and contracted in its diameter is fitted a thin steel shell made up of several sepa-

rate sections overlapping like the sections of a telescope. The shaft is called the core. The shell when fitted over the core is held rigid by it and the core and shell are driven into the ground with a pile driver. The core is then contracted or "collapsed" and drawn out, and used to carry in other shells. The shells are left in the ground and filled with concrete, thus becoming "Raymond concrete piles". The Raymond Company owns its cores, which are of certain regular lengths - 2[illegible], 25, 3[illegible], 35 and 40 feet - but orders its shells made by steel manufacturers for each job. Of course to make a firm foundation the piles must rest on "hard pan" of some sort - blue clay perhaps; and undoubtedly for this reason it was made a test or standard in this case that the cores and shells must be driven until the bottom on which the shell with its concrete filling must rest was so hard that an inch of further penetration could not be obtained by fifteen blows of the standard hammer described. Then the foundation for the pile was to be considered safe and the driving stop.

The proposition or bid which the contractor made on the job described in the drawings and specifications was made on a printed form used by the contractor for such proposals, so arranged as to make a contract if signed by the party to whom it was submitted beneath the word "Accepted" in print at its foot. It was not so signed in the present case, however. A separate formal contract was executed as hereinafter recited, of which the proposal was made a part by reference. This proposition in typewriting, which supplemented the printed provisions, contained these clauses material to this controversy:

"We offer to furnish all tools and materials, machinery and labor, and install 739 -20 foot Raymond concrete piles and reinforced footings for the same in the foundation for warehouse for Hartman Company at 39th & LaSalle Sts.,

Chicago, Ills., as shown by your blue print, for the price hereinafter named.

* * * * * * * *

The price referred to in first paragraph hereof shall be as follows:

739 - 20 foot piles together with reinforced concrete Footings as shown in blue print, $23,500.

Additions per lineal foot over 20 feet on such piles as exceed 20 feet in length, 1.10.

Deductions per foot of omitted length from the 20 foot basis on such piles as fail to reach a length of 20 feet, .80."

In the printed matter besides a specification of the nature of the concrete which the contractor will use, and provisions or conditions concerning the duties of the owner in connection with the work, occur these following clauses, the figures "15" and "1"" alone being written:

"The pile core shall in each case be driven until not more than 15 blows of a No. 2 Vulcan steam hammer are required to secure 1" penetration. Should boulders or other obstructions be encountered which prevent securing further penetration, driving shall cease and the pile be considered a completed pile unless such obstructions are removed by you to permit of further driving. Length of pile to be paid for shall be the length of shell actually driven in the ground unless the shell is filled to a point above the surface of the ground, in which case the length of pile to be paid for shall be the length from the point of the shell to the top of the concrete in said shell.

* * * * * * * * * *

Work shall be commenced as soon after acceptance of this proposal or execution of a contract based on this proposal as an outfit can be assembled upon the site and shall be pushed to completion as speedily as is consistent with good workmanship, but subject to all delays from strikes, lockouts, differences with workmen or any other causes or contingencies beyond our control.

Payments shall be made on or before the 15th day of each month and shall be for ninety per cent. of the contract price of the work performed during the preceding month. Final payment shall be made within 30 days after completion of the work covered by this proposal."

We call attention in the case of these provisions to another inept expression of what is really evidently meant by the first printed paragraph quoted. The italics therein are ours. Instead of reading in a word, as is necessary in the architect's specifications, it is here necessary to omit one to

make sense. Evidently what is meant is that "the pile core shall in each case be driven until more than 15 blows of a No. 2 Vulcan steam hammer are required to secure 1" penetration" - that is, until the "hard pan" which the core has reached is so hard that the standard provided for in the specifications has been attained.

As stated, the proposal was not accepted on its face, but a separate document of even date to which it was appended was executed. This contract was prepared on a printed form entitled "The Uniform Contract", and stated to be a form recommended by certain associations of architects and of builders. It was signed by contractors and owners and contains these provisions among others:

"Article I. The contractor shall and will provide all the materials and perform all the work for the concrete piling and footings required for the erection and completion of a seven story and basement warehouse to be erected on property situated on LaSalle St. south of 59th st., Chicago, Illinois, as shown on the drawings and described in the specifications prepared by Ottenheimer, Stern & Reichert, architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

* * * * * * * *

It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architects and their decision as to the true construction and meaning of the drawings and specifications shall be final.

* * * * * * * *

Article III. No alterations shall be made in the work except upon written order of the architects, the amount to be paid by owner or allowed by the contractor by virtue of such alterations to be stated in said order. Should the owner and contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Article XI of this contract.

* * * * * * * *

Article VI. The contractors shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to-wit: the entire work called for under this contract shall be completed on or before September thirtieth 30, 1910.

* * * * * * * *

Should the contractors be delayed in the prosecution or completion of the work by the act, neglect or default of the owners, of the architects, or of any other con-

tractors employed by the owner upon the work, or by any damage caused by fire or other casualty for which the contractor shall not be responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, which extended period shall be determined and fixed by the architects; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty-eight hours of the occurrence of such delay.

Article VIII. The owners agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractors, agree that they will reimburse the contractors for such loss and the contractors agree that if they shall delay the progress of the work so as to cause loss for which the owners shall become liable, then they shall reimburse the owners for such loss. Should the owners and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration, as provided in Article XII of this contract."

Article IX.names $23,500 as the total sum to be paid to the contractor by the owner for the labor and materials and contains the provision that payments shall be made only upon certificates of the architect.

Article XIII. provides for arbitration in case the owner and contractor differ as to payments and either dissents from the decision of the architect mentioned in Article VII.

The contractor on September 12, 1910 (so the Master found, correctly, as we think, from the evidence) began setting up its pile driver and by the sixteenth had installed such pile driver suitable for driving 20 foot piles, and began to drive 20 foot piles. It had then on hand the requisite cores and shells to drive 739 - 20 foot piles. But it was found at once by the architect that the nature of the soil was such, and that the piles went down so easily under the blows of the hammer, that 20 foot piles would not furnish a safe foundation for the building; in other words, that they would not reach hard pan. From September 16, 1910, to September 26, 1910, the contractor under

the direction and orders of the architect who represented the owner was experimenting with longer piles in various parts of the owner's excavated cellar. On September 26th the architect found that nothing under a 35 foot pile would be sufficient and ordered the contractor to put in such 35 foot piles. This rendered necessary the instalment of other pile drivers of a larger size and the procuring of 35 foot shells, which, in view of the specifications, which called for piles only 2[illegible] feet long, and of the contract, which was for the materials and work "shown on the drawings and described in the specifications", it had not provided. October 4, 1910, it had the necessary pile drivers and shells at hand to begin driving 35 foot piles and from that day to November 4, 1910, continued to drive piles. On this last day the entire number of piles required had been driven. During the month thus taken, the contractor was continuously at work, but was delayed to some extent by inability to get enough 35 foot shells from the manufacturer to keep it steadily employed at its maximum capacity. Otherwise it went on with expedition satisfactory to the architect.

Farther excavation which was to be made by the owner (through other contractors) had to be executed before the Raymond Company could complete its contract. Although by the original agreement it was to provide material for and do the work of constructing the footings to be placed on the piles, this had been by mutual consent withdrawn from the contract and this part of the work undertaken by another contracting company. A deduction of $3558.20 from the price named in the contract of $23,550 had been agreed on for this withdrawal. In connection with the furnishing of these footings certain excavations had to be made and the same contract-

ing Company which had undertaken the excavations took on the footings. It did not begin the further excavation necessary to enable the complainant to cut off the shells to the required level until November 1, 1910. The complainant Company began the cutting of the shells November 8, 1910, and finished said cutting and moved off its pile drivers and appliances (thus completing its contract) by November 2[illegible], 1910.

The Master also found, and,we think, correctly, that it was a surprise to both parties to find that the 20 foot piles required by the specifications were insufficient for the foundation; that it was not until after ten days of experiment ending on September 26, 1910, that the proper length of pile could safely be determined on; that it was impossible for the contractor to begin to drive the piles so determined on until October 4, 1910, because of the necessity for the securing of other pile drivers and new and different shells, and that after the driving began there was no unnecessary or unreasonable delay by the contractor in carrying on the work up to the time of the completion of its contract.

After the decision had been reached that a 35 foot pile would be necessary, a difference arose between the owner and the contractor (that is, between the defendant and complainant in this suit) which led to verbal and written discussions between them and with and through the architect. The owner maintained that a condition having arisen which neither party had contemplated when the contract was made, "that the contract was practically at an end" and "that the situation presented required a new arrangement." That is, the owner considered that the specifications and contract called for 20 foot piles. They provided that these piles need not be driven to their full length in case that at a less depth fifteen blows of the specified hammer did not give them an

inch of penetration, and in that case 8 cents was to be allowed and deducted from the contract compensation for each foot of the pile which was not required.

On the other hand it was recognized that there might be some extra piles required and some piles required over the specified length of 20 feet. For each foot of such extra piles or additional length an extra sum of $1.10 for each foot was to be paid to the contractor.

But, contended the owner, it was never contemplated that all the piles should be 35 feet long or of any length exceeding 20 feet. While $1.10 for each extra foot in length required might be a proper compensation for occasional instances out of the ordinary run of piles driven, it was too much to pay when the entire essence of the contract was changed.

The contractor opposed to this view the contention that while the specifications and therefore the contract called for 20 foot piles, on the basis of the gross payment for the job which the contract fixed, a provision in the contract itself recognized the possibility of alteration on the order of the architect and (inasmuch as the "proposal" was a part of the contract) the extra payment of $1.10 for each foot of length in piling made necessary by such alteration in the requirements.

It is our opinion that this contention of the contractor was well founded. The owner and contractor did not reach an agreement in this dispute, which continued during the progress of the work and afterward.

The owner, however, as it went on, took a different position and urges it strongly in this appeal. It is thus expressed in letters of the owner (by its attorney) to the architect under date of Oct. 14, 191[illegible], and of November 18, 1916, respectively:

"We met the representative of the contractor at your office and submitted a proposition which we consider more than fair and liberal to the contractor. He however seemed to take the position that the prices fixed by the original contract were to prevail under the present known conditions. Now we desire to say to you that if the contract originally made is to apply as to price, it must be applied as to everything else and the contract must be lived up to, and any defaults on the part of the contractor must be compensated in damages. This applies to the time provision and to every other provision. * * *"

"If it is claimed that the compensation for work done must be determined by the rates fixed in that contract, then we must insist that the contract be held binding * * * in all other respects. This includes among other things the time within which the work was to be done and the removal of equipment and material from the premises after the work. * * * The last pile was not driven until November 3, and the equipment of the contractor was not removed from the premises until November 14. * * * When it became apparent in the latter part of September that the contractor was not going to be able to and would not fulfil his contract, we were perfectly willing to make a just and equitable arrangement with reference to the prosecution of the work. The contractor, however, was unwilling to listen to any suggestion on that line and insisted that he was going to do the work and claim the rate of compensation provided in the original contract. * * * The delay on the contract in this matter has inflicted upon us a loss * * * and we do not feel that we should be called upon to bear these losses and at the same time to pay this contractor the same compensation that he would have received under his original contract, had he performed that contract in time and manner as required by its terms, and we do not propose to do so."

It is on this position that the claim of the defendant for an allowance of $10,080, or in the alternative of $4,144, as previously noted, is based. The computation is made as follows: The defendant says that the contractors to place the footings were ready to begin work on October 10, 1910, and had the complainant been through at that time instead of 37 days afterward, the warehouse would have been constructed at least 37 days earlier, and that the rental value of it for 37 days was proved to be $4,144. But defendant also says that this amount does not adquately represent the actual damages it suffered by delay, for the delay of 37 days led to further delay because of the advent of winter, and that the completion of the building was in fact delayed through the default of the complainant from March

1, 1911, to June 1, 1911, which resulted in a loss of rental value of $10,080.

We have given this contention the attention that its importance to the parties deserves, but we cannot give it our assent. We hold that the contract, taken as a whole, means not that all pile cores were to be driven until fifteen blows of the hammer would not produce an inch of penetration, but only that they were to be driven to the full length, which was specified to be twenty feet, in case they did not reach before that a point where fifteen blows of the hammer did not produce such an amount of penetration, in which case no more driving was obligatory. We hold also that in the contract (with the specifications and proposals which were a part of it) it was implied that an addition to the length of some or of all of the piles might be necessary; that if any longer piles than the ones "called for" by the specifications were ordered by the architect, and furnished by the contractor, there should be added to the amount which would otherwise be due to the contractor $1.10 for each additional lineal foot, and the additional work and materials should be considered "extra" work.

The question at issue, so far as an allowance to the owner for damages because of the contractor's exceeding the time limit, is concerned, is then reduced to this: Did the time limit apply to "extra" work which the contract recognized as possibly requisite? Because of such recognition, the defendant contends that it did. But we do not take that view. It was the work "called for" under the contract which was to be completed by September 30, 1910. The recognition of the possibility that extra work might be necessary and the fixing of a price for it in that contingency did not

make the extra work "called for". It was not "called for" until September 26, 1910. Then it was called for by the architect, who, for this purpose, we hold to have represented and been pro hac vice the "owner".

The authorities would seem to be in accordance with right reason in holding that when extra work not specified is demanded and executed that a reasonable time, independently of the general time limit provided by the contract for the particularly specified work, is allowed to the contractor who has undertaken to do it in accordance with the other provisions of his contract.

See, for example, the authorities cited in the opinion of Judge Waterman in this Court in Harrison vs. Trickett, 57 Ill. App. 510, to his dictum therein contained: "For such delay as was reasonable, that is for such time as was reasonably required in which to do the extra work and such delay as on account thereof was caused, appellee was by the extra work excused".

See, also, Lilly v. Person et al., 168 Pa.St. 219, and Focht v. Rosenbaum, 176 Pa. St. 14, (in which the Court said the right of the owner was not dependent upon the form of the order for the change which caused it, but upon the question, which was for the jury to decide on the evidence, whether the delay was attributable to a want of diligence or foresight on the part of the plaintiff); and also Lauer v. Brown, 36 Barbour, 416, in which the Supreme Court of New York, although taking the ground that in that particular case the time for completing the job, including an additional fourth story to the building originally planned, was fixed by the contract, said:

"Nevertheless, if the defendant assumed to elect to have a fourth story so late that there was not a reasonable time remaining to add that story and have all the work done by the period named in the contract or as extended, and yet the plaintiff acquiesced in the election, the circumstances may have been such as to warrant the finding that the parties mutually waived the stipulation in the contract as to the time when the work should be done."

The Master in the case at bar found that it was impossible to drive the longer piles ordered between September 26th and September 30th, or to begin the driving until October 4th, and that there was no unnecessary or unreasonable delay in driving or cutting the piles or in removing the machines and debris after the work was done. We think these findings were justified by the evidence.

From this conclusion it follows that any claim for damages against the complainant Company for delay should be disallowed, and that the amount of the original contract plus the compensation at $1.10 per foot for the extra feet in the piling and the other small extra charges made in connection with the altered requirements, less the credits agreed on and the amount paid, was due to the contractor at the time its bill was rendered in November, 1910, and that such an amount was properly found by the Chancellor to be due at that time, and a lien properly declared therefor. The decree also provided for interest on that sum of $19,686.8- at 5% per annum from November 30, 1910, to the date of the decree, January 8, 1913. This at least, it is strenuously urged by defendant, was erroneous, and especially so as to the interest on the amount allowed for the extra work. We do not think so. We think that as the extra price for extra work was provided for in the contract, the whole amount found due was due under the provisions of a written instrument. On that ground and on the further one that the Mechanic's Lien Statute provides for it,

interest was properly allowed.

We do not think that it is necessary further to extend this opinion by discussing other objections made by defendant to the validity of the complainant's claim and to the decree. They are essentially disposed of by the view which we have indicated we take of the contract and the evidence. We think that where a 35 foot core was driven for its full length, the contract and the orders of the architect (representing the owner) were fulfilled. The work was accepted. The necessity of a written order by the architect for the different piling was waived, if it existed, and we think the Master was right in finding that an architect's certificate should have been issued and delivered to the complainant, certifying that it was entitled to the balance due under the contract and for the extra length of piles and for certain extra work; and that such certificate was not withheld because of any claim for defective or unfinished work, but only because of an unjustified counter claim for damages for delay.

The decree of the Circuit Court is affirmed.

AFFIRMED.

March Term, 1913, No.

1159

340 - 19354

THE VOLUNTEERS OF AMERICA, Appellee

vs.

DANIEL A. PRINCE et al.
On Appeal of MARIA L. COX et al., Appellants.

187 I.A. 428

299 - 19306

THE VOLUNTEERS OF AMERICA, Appellee

vs.

DANIEL A. PRINCE et al.,
On Appeal of MICHIGAN ANTI-SALOON LEAGUE, Appellant.

APPEALS FROM SUPERIOR COURT OF COOK COUNTY.

319 - 19332

THE VOLUNTEERS OF AMERICA

vs.

DANIEL A. PRINCE et al.,
On Appeal of THE BUCHANAN ANTI-SALOON LEAGUE OF BUCHANAN, MICHIGAN.

STATEMENT BY THE COURT.

April 19, 1910, Sarah A. Rawley, a widow, living in Chicago, who had been in former years a resident of Buchanan, Michigan, died in Buchanan, where she was then living or visiting with a sister. For two years she had been back and forth between the two places much. She left a large estate amounting to $226,000. By will she made her "friend, Daniel A. Peirce of Chicago, the executor of said will", and spoke of the executor thereafter as also the Trustee under her residuary bequest hereinafter set forth. She disposed of her estate by specific legacies mostly to relatives or connections, many of whom were described as of Buchanan, and by a residuary bequest. The legacies to individuals, together with one of five hundred dollars to the First Christian

Church of Buchanan, aggregated $53,100. The residuary bequest was as follows:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate of every name and nature whatsoever, that I may die possessed of, or be entitled to at the time of my death, to my executor and trustee, hereinafter named, in trust for the following named institutions, societies or organizations, viz:

The Illinois Humane Society of the City of Chicago in said County of Cook and State of Illinois.

The Old People's Home, now situated at or near the corner of Indiana avenue and Thirty-ninth street in the City of Chicago, in the County of Cook and State of Illinois.

The Volunteers of America, now located at 184 Dearborn street, in said City of Chicago.

The Home of the Friendless, now located at Vincennes avenue and Fifty-first street, in the City of Chicago, County of Cook and State of Illinois.

The Buchanan Anti-Saloon League of said Buchanan, Michigan.

The Young Men's Christian Association of said Buchanan, Michigan, if there shall be in existence at the time of my death in said Buchanan, Michigan, an organization of that name. If there shall not be an organization of that name in existence in said Buchanan at the time of my death, then to the Young Men's Christian Association of said City of Chicago, to be divided equally among said above named institutions, societies or organizations, it being my intention that each one of the same shall receive an equal share of the residue of my estate."

The will was made in Chicago June 25, 1909, it was admitted to probate in the Probate Court of Cook County, Illinois, May 25, 1910. The specific legacies have all been paid and as executor Mr. Peirce has been discharged and released. As Trustee he has, in accordance with an agreement of the parties to the suit or suits in which this opinion is rendered, divided equally among the Illinois Humane Society, the Old People's Home of Chicago, The Volunteers of America, the Home for the Friendless of Chicago, and the Young Men's Christian Association of Chicago (there having been found no Young Men's Christian Association in existence at Buchanan at the time of the death of Mrs. Rawley) the residuary fund in his hands, except one-sixth thereof plus $5,000, which said sum is deposited on interest in the First Trust & Savings Bank of Chicago to await the final determination

of the appeals in the aforesaid suit. This fund, or that portion of it which may not be properly disposed of in the payment of costs or expenses, is the subject of this litigation, which arose as follows:

The Volunteers of America, September 7, 1911, filed a bill in chancery in the Superior Court of Cook County, making parties defendant Daniel A. Peirce as Executor and Trustee under the will of Mrs. Hawley, the Illinois Humane Society, the Home for the Friendless, the Old People's Home of the City of Chicago, "The Buchanan Anti-Saloon League of Buchanan, Michigan, a voluntary association", the Young Men's Christian Association of Chicago, the Young Men's Christian Association of Buchanan, Michigan, and Albert T. Peacock", as member and President of the Young Men's Christian Association of Buchanan, Michigan, and all unknown parties, if any, claiming to be or to have been members of an institution, society or organization on the 19th day of April, 1910, or since said time, by the name of the Young Men's Christian Association of Buchanan, Michigan." The object of the bill was to secure the amount due under the will to the Volunteers of America and it alleged that the Executor refused to account to the complainant until a dispute between the Young Men's Christian Association of Buchanan, Michigan, and the Young Men's Christian Association of Chicago was settled, "although", to quote, "the amounts, sums and proportions thereof to complainant and to the Illinois Humane Society, the Home for the Friendless, the Old People's Home, and the Buchanan Anti-Saloon League of Buchanan, Michigan, are not questioned and can be immediately distributed without regard to said dispute or its adjustment."

There is no question in the cause now before us as to any other part of the bequests in trust to Peirce than

that which was to go to the Buchanan Anti-Saloon League. The other questions have all been settled and, as noted, except as to this bequest, the estate distributed. Nothing more in the pleadings will be noted, therefore, except the matters relating to the Buchanan Anti-Saloon League.

Peirce answered the bill November 28, 1911. The answer was without particular reference to the Buchanan Anti-Saloon League, but in a cross-bill filed contemporaneously, in which he prays that the Young Men's Christian Association of Chicago and the Young Men's Christian Association of Buchanan may interplead, he alleged -

"that he is informed the Buchanan Anti-Saloon League of said Buchanan, Michigan, one of the institutions named in the will in trust for which the residuary estate was given complainant is a voluntary association, and it therefore should be incorporated or a trustee appointed for it before cross-complainant is required to pay over for it or its use and benefit the share so given to him in trust for it."

The prayers include one for a construction of the will and one -

"That the Buchanan Anti-Saloon League of Buchanan, Michigan, may be required to organize as a corporation or to have a Trustee appointed to receive and hold for it the proceeds of the share of the residuary estate devised to him in trust for it."

The cross-bill was amended December 19, 1911, but without changing the allegation or prayer in relation to the Buchanan Anti-Saloon League. As amended, however, it made the heirs at law and next of kin of the testator parties defendant, namely, Maria L. Cox, Rebecca J. Powers, James Maitland, William Maitland, Frederick Fulton and Lulu Fulton Digeby. All the defendants to the bill and amended cross-bills other than the heirs at law and next of kin filed answers to the same without questioning the right of the Buchanan Anti-Saloon to a share of the residuary bequest left in trust to Peirce.

The heirs at law and next of kin on January 15, 1912, filed an answer to the amended cross-bill, in which they said that-

"They have no knowledge or information as to the rights, if any, of the certain proposed beneficiary named in said will as the Buchanan Anti-Saloon League of Buchanan, Michigan, and ask that it be required to make due proof of its existence and right to take the bequest attempted to be made to it in and by the will of the deceased, and say that in default of making and establishing such right thereto, the said bequest, as attempted to be made to it, should become intestate and to the extent thereof would go and belong to these defendants."

January 15, 1912, "The Buchanan Anti-Saloon League of Buchanan, Michigan", answering by "William A. Barnes, its solicitor", admitted that it was a voluntary association and alleged its willingness to be incorporated as prayed in the amended cross-bill.

March 9, 1912, the cross-complainant heirs obtained leave of court to file amendments to his amended cross-bill and an order was made that in default of further answer from the cross-defendants within seven days, their answers to the amended cross-bills stand as answers to the amended cross-bill as further amended. The amendments to the amended cross-bills were accordingly filed on the same day, March 9, 1912. They alleged that a controversy had arisen between the heirs of Sarah A. Hawley and the Buchanan Anti-Saloon League of Buchanan, Michigan, as to the right or capacity of the latter to have and take a share of the residuary estate of the testator; that the heirs claim that the bequest was uncertain and void, -

"and further claim that there is no such association in fact capable of taking the same or which has lawful right thereto, and that by reason thereof said residuary estate proposed to be given it by said will became at once upon the death of said testatrix vested in her said heirs and that they are entitled as such thereto."

The heirs at law and next of kin - Cox, Bowers, Maitland, et al. - answered these amendments instanter, admitting and alleging that they made the claims set forth as

theirs by the amendments and asserting that at the time of the death of the testatrix there was no such society or association in fact as the Buchanan Anti-Saloon League of Buchanan, Michigan, and that there was no other society in Buchanan having a like name that was capable of taking said attempted bequest; that the Court was without power to appoint a trustee to take the same, and that the share attempted to be given to the Buchanan Anti-Saloon League vested at death of the testatrix in them, and that they were entitled to have the same paid and distributed to them.

March 16, 1912, the Buchanan Anti-Saloon League of Buchanan, Michigan, again signing "by William A. Barnes, its solicitor", answered the amended cross-bill of Peirce as amended. It alleged in its answer that it had the lawful right and capacity to take said bequest, and that an order of the County Judge of Cook County, Illinois, on October 19, 1910, in a proceeding to appraise the property of the decedent and determine the inheritance tax, found that the Buchanan Anti-Saloon League was one of the beneficiaries under the will and entitled to take the bequest therein given to it; that no appeal was taken from said order, which remains in full force and effect.

The Young Men's Christian Association of Buchanan answered the amended cross-bill as amended without attacking the right of the Buchanan Anti-Saloon League to take. The Young Men's Christian Association of Chicago answered on March 16, 1912, denying the right of the Buchanan Anti-Saloon League to take the bequest in question, but denying also that the heirs had any right to said share and claiming that because of the lapse of said bequest one-fifth of the one-sixth of said residuary estate attempted to be bequeathed to the Buchanan Anti-Saloon

League should come to it, the Young Men's Christian Association of Chicago.

The Old People's Home and the Volunteers of American answered that if it should be determined that the bequest for the benefit of the Buchanan Anti-Saloon League had lapsed, the lapsed share should be paid to the remaining residuary legatees in equal shares and not to the heirs at law of the testatrix.

The Illinois Humane Society and the Home for the Friendless appear to have allowed their answers to the amended cross-bill to stand as answers to the amended cross-bill as amended.

Replications were duly filed to the answers and the cause was referred to a Master, who took evidence and on July 29, 1913, filed his report of the same with his conclusions thereon. One of his conclusions was that -

"At the time the will of said deceased took effect there was not in existence any such society or organization as the Buchanan Anti-Saloon League of Buchanan, Michigan, capable of taking the attempted bequest proposed by said will to it by that name; and that the share or interest in said residuary estate so failing is not otherwise disposed of under said will, and the Master especially reserves the question as to where said attempted bequest so failing should go as between the residuary legatees and the heirs at law of said Sarah A. Hawley, deceased."

Objections to the Report, which had been overruled by the Master, were ordered to stand as exceptions before the Court.

August 1, 1913, a corporation named the Michigan Anti-Saloon League filed an appearance in the cause and asked permission to intervene. August 7, 1913, it filed its verified motion to the same end, appending to said motion a sworn intervening petition which it desired to file. This intervening petition stated the existence and history of the petitioner,

asserted that it had sent speakers and printed matter into Buchanan, Michigan, for the accomplishment of its purpose, "to curtail the use of intoxicating liquors", etc.; that it had made efforts in 1909 to organize a campaign under the laws of Michigan for the abolition of saloons in the County of Berrien, where Buchanan is located; that its efforts resulted in February, 1909, in a meeting by the citizens of Buchanan and the adoption at said meeting "of the name of Buchanan Local Option League, operating, however, in harmony and conjunction with the petitioner and at its behest and as a part of the anti-saloon movement of the petitioner."

The petitioner then alleged that the testatrix, Sarah Hawley, intended to make a provision for "the promotion and prosecution of the anti-saloon work of the petitioner as conducted by it, but "did not know the correct corporate name of the petitioner, as its work had been carried out in Buchanan, Michigan, as well as in other localities, by and as far as was practical in the name of the local citizens and organizations interested in the petitioner's work and induced and procured by it."

Further allegations were that the bequest in favor of the Buchanan Anti-Saloon League was intended for the promotion of the "general movement and work" of the petitioner, but as the Master had found against the claim of the Buchanan Anti-Saloon League, the bequest was in danger of being diverted from said objects and the bequest lost to the "anti-saloon movement and work at Buchanan and in the State of Michigan as intended by the testatrix.

It was represented that if the Court should find that there was a competent legal entity known as the Buchanan Anti-Saloon League to administer the charitable fund and bequest at the time of the death of said Sarah A. Hawley

for the purpose intended by the testatrix, then it should take the bequest, but if not, the petitioner was ready and willing to carry out the object of the testatrix and should receive the bequest. Therefore it prays for a decree directing the Trustee to pay over the said bequest to it.

While the motion for leave to file this petition was pending and undisposed of, on August 8, 1912, the Volunteers of America, by leave of court, amended its original bill, setting up by the amendments specifically that the Buchanan Anti-Saloon League of Buchanan, Michigan, was not legally qualified and capable of taking under the will and asserting that -

"by reason thereof the remaining beneficiaries of the said residuary estate are each entitled to receive an equal one-fifth share of said trust fund instead of one-sixth, which would be the share had there been six charitable organizations qualified and capable of sharing equally in said trust fund."

August 13, 1912, the Buchanan Anti-Saloon League of Buchanan filed an answer to the bill as amended, asserting its qualification and capability to take the bequest provided for it and representing that an order of the County Court in full force and effect had found it entitled to it.

The Old People's Home and the Young Men's Christian Association of Chicago filed on August 13, 1912, and August 14, 1912, respectively, answers to the amended bill, each claiming a share of one-fifth in the bequest made to the Buchanan Anti-Saloon League.

The Young Men's Christian Association's answer denied the allegation of the amended bill that the Buchanan Anti-Saloon League was "an unincorporated society of individuals", and asserted that there was no such society or organization as the Anti-Saloon League of Buchanan, Michigan,

in existence at the date of the death of Sarah A. Hawley.

The answers of all other defendants to the original bill stood by order of court as answers to the bill as amended.

September 2[illegible], 1912, the Court refused leave to the Michigan Anti-Saloon League to file its intervening petition before described, to which ruling the Michigan Anti-Saloon League objected and excepted.

Four stipulations were also filed September 20, 1912, and by a certificate of the Chancellor made a part of the record. They contain the agreement of all the parties to the suit heretofore mentioned in accordance with which all the residuary fund in the hands of the Trustee except one-sixth thereof, plus $5000, was distributed equally between the Volunteers of America, the Illinois Humane Society, the Old People's Home, the Home for the Friendless and the Young Men's Christian Association of Chicago, without prejudice to the right to continue the litigation as to the bequest herein in controversy.

Thereupon the Superior Court entered a decree on said September 2[illegible], 1912, which contained, among other findings, the following:

"The Court further finds that the Buchanan Anti-Saloon League of Buchanan, Michigan, named in the last will and testament of the said Sarah A. Hawley, deceased, was a beneficiary in the Trust Fund bequeathed to Daniel A. Pierce, Trustee, as aforesaid, was not a corporation; that a public meeting in the Presbyterian Church in said town was held on the 28th day of February, 1909, for the purpose of assisting in carrying on a campaign for 'Local Option', so-called, in Berrien County, Michigan, at an election then ensuing in April, 1909; that at said meeting on February 28, 1909, there was elected a President, a Secretary, a Treasurer and a Committee to solicit funds for the campaign expenses; that the meeting adopted the name 'Buchanan Local Option League' and its Committee collected a small amount of money, which the treasurer deposited in a bank to the credit of the Buchanan Anti-Saloon League, which deposit was drawn on from time to time and all used for campaign purposes, the names 'Buchanan Local Option League' and 'Buchanan Anti-Saloon League' being used to some extent in-

terchangeably. The Court further finds that there was no incorporation of said society or association; that it had no by-laws; that it had at no time had or maintained an office or trustees; and that no time was there a roll of members, nor any definite membership acting under said meeting of February 28, 1909. The Court further finds that the meeting so held on February 28, 1909, made no provision for subsequent meetings or for the election of officers of any kind at any time, and that the said meeting of February 28, 1909, was the only meeting called or held by the persons participating therein under the name of 'Buchanan Local Option League' or 'Buchanan Anti-Saloon League' or a like name, prior to the death of Sarah A. Hawley, deceased.

That 'Local Option', so-called, was the question whether saloons should be allowed to exist in Berrien County, Michigan, of which County the said Town of Buchanan was a part, and that question was submitted to the voters of that County at the spring election held in April, 1909, and the said meeting of February 28, 1909, where the so-called Buchanan Anti-Saloon meeting was held, was for the purpose of assisting in the campaign leading up to that election. The Court further finds that the aims and objects of said society were temporary in character and came within the legal definition of charitable purposes and that the purpose of the meeting and the work of the committee and officers of said Buchanan Anti-Saloon League were at an end, when the said election in the spring of 1909 was over.

The Court further finds that at the time of the decease of the said Sarah A. Hawley there was not in existence any such organization or society as 'The Anti-Saloon League' of Buchanan, Michigan, capable of taking the attempted bequest proposed by said will of the said Sarah A. Hawley, deceased, to it, under said name of Buchanan Anti-Saloon League, or any other name.

The decree contained also this finding:

"The Court further finds from the proofs in this case, that by the provisions of her will, Sarah A. Hawley intended to dispose of her entire estate and that she intended that the residuary trust fund which she bequeathed to Daniel A. Peirce as trustee was to be used for charitable purposes and not otherwise, and that the beneficiaries named by her as participants in the trust fund so bequeathed to Daniel A. Peirce, trustee, were charitable organizations and societies, constituting a class by themselves, who were to share in said residuary trust fund as members of a class, and not as individuals. That by reason of the non-existence of the Buchanan Anti-Saloon League at the time of the death of said Sarah A. Hawley, the shares which the organizations named in said residuary clause, that were in fact in existence and capable of taking at the time of the decease of the testatrix, were thereby proportionately increased."

The ordering part of the decree in accordance with these findings orders the Trustee to pay over the funds in his hands to the Illinois Humane Society, the Old People's Home

of the City of Chicago, the Chicago Home for the Friendless, the Young Men's Christian Association of Chicago and the Volunteers of America, giving to each an equal one-fifth share.

The Court also in the decree recites the appearance and motion of the Michigan Anti-Saloon League, hereinbefore set out, and the presence of the said Michigan Anti-Saloon League by its solicitor "during the argument and hearing of the cause upon the motion for the entry of a decree therein on the Master's Report; and after denying the motion of the Michigan Anti-Saloon League to file its said intervening petition, finds that it "has not by its said motion or petition shown any right or title to any part or portion of the estate of Sarah A. Hawley, deceased, in the hands of said Daniel A. Peirce."

From this decree the Buchanan Anti-Saloon League, Maria L. Cox, jointly with others who were the heirs at law and next of kin of Sarah A. Hawley, and the Michigan Anti-Saloon League, prayed and were allowed separate appeals to this Court. These appeals were heard together and are b now before us for disposition.

The errors assigned by the Buchanan Anti-Saloon League are in their sum that the Court erred in not finding and decreeing that the Buchanan Anti-Saloon League was entitled to take and receive an undivided sixth of the residuary estate bequeathed by said Sarah A. Hawley. Those assigned by the heirs at law and next of kin, that the Court erred in not decreeing that one-sixth of the residuary estate should go to them as a lapsed bequest and intestate property, instead of being divided among the five charitable institutions heretofore named, who are appellees, and those assigned by the

Michigan Anti-Saloon League are that the Court erred in denying the petition of the Michigan Anti-Saloon League to intervene, rendering a decree without hearing the evidence in behalf of the claim of the Michigan Anti-Saloon League, and decreeing the one-sixth of the residuary estate claimed by it to be paid to other parties.

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

The brief for the appellees in these appeals with entire accuracy declares that this Court has first to consider whether or not the Buchanan Anti-Saloon League is entitled to the disputed share, and that "if the decision shall be in favor of the Buchanan Anti-Saloon League, that is an end of the matter so far as this Court is concerned."

As in our view of the matter there is no legal or equitable reason why the evident intention of the testator expressed in her will should not be carried out, and the share of her estate in controversy go to the "Buchanan Anti-Saloon League of Buchanan, Michigan", it is unnecessary to say anything of the questions mooted between the heirs at law and next of kin of the testator on the one side and the various bodies and organizations other than the Buchanan Anti-Saloon League on the other, who are beneficiaries under the residuary bequest. Nor are the contentions of the Michigan Anti-Saloon League of importance under this situation. It claims nothing by its proposed intervening petition as against the Buchanan Anti-Saloon League, asserting on the other hand that "It is the petitioner's desire that the intent of

the testatrix, Sarah A. Rawley, be carried out, and that the object and purpose of her bequest to the Buchanan Anti-Saloon League be made effective, and that if the Court finds that there was a competent legal entity known as the Buchanan Anti-Saloon League to administer the said charitable fund and bequest at the time of the death of said Sarah A. Rawley for the purpose intended by the testatrix, then the said Buchanan Anti-Saloon League should take said bequest.

We may say in passing, however, in order that our opinion may be available if it should become important in any further proceedings in this cause in any other forum, that it seems to us that the Court below was acting within a discretion belonging to it in refusing permission to intervene at the stage in the litigation reached when the motion was made. As this, however, is probably entirely immaterial in view of the conclusion at which we have arrived, we shall not stop to point out why we do not hold the case of Shanahan v. Stevens, 139 Ill., 438, deemed by the counsel for the Michigan Anti-Saloon League conclusive, as even in point on the question raised here. It remains, therefore, for us only to give as briefly as is consistent with clearness our reasons for disagreeing with the learned Chancellor below and holding that the portion of her estate in controversy should be paid to the Buchanan Anti-Saloon League, which we think existed as an unincorporated, voluntary association, capable of taking the bequest made to it at the time of making the will, at the time the testatrix died and at the time the decree was entered.

The intention of the testatrix was very clear. The Buchanan Anti-Saloon League was organized on February 28, 1909. It is maintained that its object was temporary and terminated in April, 1909, when an election was held in Berrien

County, Michigan, under a local option law - a contention we will consider later. However that may be, Mrs. Hawley was not only a former resident of Buchanan, but for the two years preceding her death in 1910 she had lived much of the time in Buchanan. There is therefore every reason to believe that she was entirely aware on June 25, 1909, when she made the will, that the immediate and imminent primary purpose of the association which organized in Buchanan on February 26, 1909, and called itself a local "Anti-Saloon League", namely, that of influencing the election in Berrien County in April, 1909, had passed. Nevertheless first of all the objects for which she told her adviser she wished her residuary estate to go, was that of assisting the Buchanan Anti-Saloon League. As to the other objects of her bounty she consulted him, but as to that one she had her mind made up. It is no violent inference that she did not consider its purpose over or its existence terminated, and that she meant to put it in funds to continue an agitation or influence which she deemed beneficial. So long as this was not an immoral object, this was plainly within her right to do. Moreover, the intention undoubtedly being to benefit the community, according to the opinion of the testatrix, the object is legally a "charity" under the Statute of 43 Elizabeth, 4, which is in force in this State. And this without reference to the wisdom or unwisdom of the purpose. Such is the well settled law.

George v. Braddock, 45 N. J. Eq. 757;
Haines v. Allen, 78 Indiana, 100;
Thornton v. Howe, 31 Beavan, 14;
in re. Foveaux, L. R. Ch. Div., vol. 2. of 1895, - 501. Same case in Law Journal Reports, vol. 64, page 856;
Garrison v. Little, 75 Ill. App., 402.

It is not contended by the appellees that the purpose of the bequest as made was not legally "a charity", nor seriously so argued by the appellant heirs. The Court indeed in its decree found that "the aims and objects of said society (i. e. the Buchanan Anti-Saloon League) * * * came within the legal definition of charitable purposes."

It follows from the fact that the bequest is for "a charity" that it should be favored by the courts and liberally construed. The courts will be "keen sighted" to sustain charitable bequests. See Quimby v. Quimby, 175 Ill. App. 367, p. 374. It is needless to pile up citations to this effect. Our own Supreme Court has said in one case, "There is to be most liberal construction of the donor's intention, in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals." Hunt v. Fowler, 121 Ill. 269. And in another, "Such gifts are looked upon with peculiar favor by the courts, which take special care to enforce them, and every presumption consistent with the language used will be indulged to sustain them. If a testator has manifested a general intention to give to charity, the charity is regarded as the matter of substance and the gift will be sustained though it may not be possible to carry it out in the particular manner indicated."

Franklin v. Hastings, 253 Ill. 46.

It does not seem to us that in the case at bar the decree of the Court below shows special care to enforce the gift and the intention of the testatrix.

The object of the Buchanan Anti-Saloon League as expressed by the President that it elected on its organization on February 26, 1909, - Mr. Roe - (see his testimony and the minutes of the meeting) was "to educate the people to

influence the making of laws to suppress the saloons through local option." In the minutes of the organization meeting it is expressed to be "to supervise the fight against the saloon here and assist the County and State work."

Neither of these objects necessarily ended with the imminent work which the League felt itself called to do and which was the immediate occasion of its organization, that is, assistance in carrying on a campaign in Berrien County in the spring of 1909 under the local option law. As before noted, the testatrix may be presumed to have known quite well when making her will and insisting on that bequest, that that campaign was ended and the League defeated in its purpose concerning it. But a battle is not a war, and the law still stood which allowed, under other conditions and at future times, other campaigns indefinitely.

That the association, if it exists at all, as it claims to do, has the same objects as those which are above stated, is shown by the articles of association it adopted at a meeting on August 2, 1910, in anticipation of incorporation, the qualifications of members being stated to be, among others, that they should seek every legitimate means of educating and enlisting the people in the work of suppressing the saloon under local option.

That it has never been incorporated, that, as found by the decree, "it had no by-laws", "that at no time it had or maintained an office or trustee", "that at no time was there a roll of members", nor even that the meeting which the minutes expressly say was for the purpose of organizing "a local anti-saloon league" voted that the association should be known as the "Buchanan Local Option League", and then immediately opened a bank account and did business as the "Buchanan Anti-Saloon League", and was so known, - none of these things

need prevent the carrying out of the testatrix's bequest to it. There can be no reasonable doubt of the association which the testatrix had in mind, and there is abundant authority in this State, as well as in others, to sustain the statement of Story in his "Commentaries on Equity Jurisprudence", vol. 2, Section 1169 -

"Another principle, equally well established, is that if the bequest be for charity it matters not how uncertain the persons or the objects may be; or whether the persons who are to take are in esse or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into exact execution or not, for in all these and the like cases the court will sustain the legacy and give it effect. * * *"

Houser v. Harris, 42 Ill.,423;

Andrews v. Andrews, 110 Ill., 223;

Hemmerer v. Hemmerer, 253 Ill.,327;

Silsby v. Barlow, 82 Mass., 329;

Beatty v. Kurtz, 2 Peters, 566.

It is not, however, in the last analysis, because of these noted deficiencies in the organization of the Buchanan Anti-Saloon League that inability to take the bequest which was intended for it is attributed to it by the decree and by the arguments in these appeals to uphold the decree in this particular. The determining reason for denying to the Buchanan Anti-Saloon League the benefit of its bequest is its alleged non-existence at the time of Mrs. Hawley's death. The Court by its decree impliedly, at least, finds that such an association was organized in February, 1909, but that it had ceased to exist before Mrs. Hawley died and this is the express contention of the appellees, although it may be noted that counsel for one of them, during the taking of evidence before the Master, himself introduced evidence "for the purpose of showing that this Anti-Saloon League of Buchanan, Michigan, was actually in existence in August, 1910, and had proceedings there."

For reasons partly before suggested, we do not an-

sent to the theory that the Buchanan Anti-Saloon League had ceased to be before Mrs. Hawley died in April, 1910.

It had an organization with officers, albeit a loose one; it had had a bank account and financial transactions, although small ones; it had taken part in a political contest and carried on correspondence afterward; its aims and objects were not necessarily temporary or to be ultimately attained or defeated in one election. It could not, however, have carried on another campaign under the law before Mrs. Hawley's death, because the time limit against a renewed agitation had not expired. There was therefore no evidence of abandonment of the organization by non-user.

There was no dissolution by the voluntary action of its members nor any resignation or withdrawal by its officers. In June, 1910, it held a meeting to give its consent to the executors turning over certain personal effects of the testatrix to her sisters, and in August, 1910, to take steps to incorporate under the laws of Michigan, at which meeting a motion was carried that the officers elected at the first meeting remain in office until they should be superseded.

We do not think that the "tender care" and the "keen sight" which the law requires of courts of equity in furtherance of the intentions of a testator in favor of a particular "charitable purpose" can allow any other disposition of the bequest in question than its payment in some form to or for the benefit of the Buchanan Anti-Saloon League of Buchanan, Michigan, which we hold is still in existence. If on the amended cross-bill of the Trustee, which asks that the Buchanan Anti-Saloon League should be incorporated or a trustee appointed for it before cross-complainant is required to pay over for it or its use and benefit the share so given to him

in trust for it, and on the answer of the Buchanan Anti-Saloon League to said amended cross-bill, which avows its willingness at any time, as the Court may decree, to be incorporated, the Court below deems it proper to order such incorporation or to appoint a trustee before ordering the money paid over, that may be done; but so far as the disposition of this portion of the residuary bequest to the Trustee, Peirce, is concerned, the decree of the Superior Court is reversed and the cause remanded to the Superior Court for proceedings not inconsistent with this opinion, which shall secure the benefit of the portion of the bequest in question to the Buchanan Anti-Saloon League.

This order will be entered in each of the appeals.

REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

tober Term, 1913. No.

465 - 19868

DENNIS GLEASON,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY and JOHN M. ROACH and HENRY A. BLAIR, Receivers of the Chicago Railways Company,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

187 I.A. 431

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff while driving a team and wagon south in the west car track in Halsted street at 18th street was struck by a car of the Chicago City Railway Company which was running north in the east track in Halsted street. A switch track led from said east track to the north track running west in 18th street from Halsted, but the car in question was a through car and was intended to cross the switch track and proceed north in Halsted street. The car instead of doing so took the switch track which led from the track on which the car was running across Halsted street to the north track in 18th street. When the car reached the west track it collided with the wagon and inflicted on plaintiff, who was riding on the wagon, the injuries complained of. The declaration in separate counts alleges that defendants were guilty of negligence in the management of the switch; in permitting the same to be in a defective condition, and in the management and operation of the tracks, switches and cars.

The defendant receivers were in possession of the railroad at the place of the accident and permitted the

Chicago City Railway Co. to operate a car over their line of railway. The law is well settled that when a railway company permits another company to use its tracks and an injury results from the negligent operation of the railway, both companies are liable to respond in damages to the party injured.

W. C. S. R. R. Co. v. Horne, 197 Ill. 250.

In C. U. T. Co. v. Giese, 229 Ill., 260, it was held that where a person rightfully on a public street is injured by a street car leaving the track and striking him, such accident is within the maxim res ipsa loquitur and the injury, in the absence of any explanation by the defendant company, is prima facie sufficient to justify a recovery. We cannot say on the evidence in this record that the verdict is contrary to the evidence.

Plaintiff suffered a compound fracture of both bones of the left leg. From the evidence the jury might properly find that the wound became infected; that plaintiff was confined to his bed for four months; that he was not able to work for a year and that his leg is still at times painful. We do not think that for such an injury, followed by such results, the award of $3500 damages is so excessive as to warrant us in reversing the judgment.

The judgment is affirmed.

AFFIRMED.

EMMA K. DELONG,
Appellee,

vs.

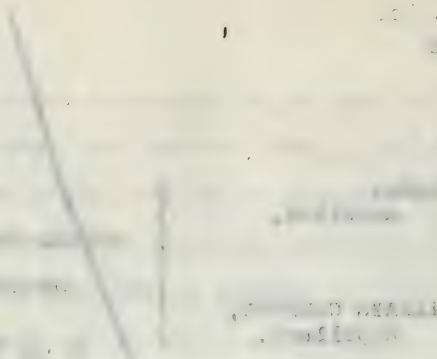
CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

187 I.A. 432

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The claim of the plaintiff is that March 25, 1911, she was a passenger on a street car of the defendant, and that while the car was stopped and she was alighting from it, the defendant negligently started the car forward, whereby she was thrown to the ground and injured, etc. For such injuries she recovered in tort for negligence a judgment for $3,000, to reverse which defendant prosecutes this appeal. Appellant does not contend that the verdict on the issue of negligence is against the evidence, but contends that the damages are excessive and that the trial Court erred in the admission of evidence. It is not disputed that the evidence shows that an ankle of the plaintiff was badly sprained and that she was treated by a physician for such sprain for two months. Plaintiff testified that before her injury she had some slight uterine trouble, a falling down of the organ slightly; that she had not before the injury been treated by a physician for such trouble; that since the injury and since she got upon her feet the trouble had been aggravated. The defendant moved to strike out the statement that the injury had been aggravated, as being too indefinite, and the Court denied the motion. She further testified that when she stood on her feet for a



few moments she suffered pain. On cross-examination she testified that she did not before her injury have a prolapsed uterus; that she thought there was a little misplacement; that after the injury she was treated for such trouble by Dr. Miller. She called Dr. Miller as a witness and he testified that he examined plaintiff in July, 1911, and was asked to state what he found. To this question defendant objected on the ground that no connection had been shown between plaintiff's injury and the condition found by Dr. Miller in July; that there was no evidence to show the condition of plaintiff's pelvic organs at the time of her injury other than her own statement that the uterus was misplaced, but the Court overruled the objection and the witness testified that he found a prolapse of the so-called pelvic organs, which included the uterus, ovaries, bladder, etc.; that prolapse meant a sinking down of the organs to a point lower than normal; that the uterus was probably two inches below where it ought to be and the other organs were prolapsed to a less degree.

We think that the testimony of the plaintiff that there was a falling down of her uterus before her injury and that such trouble had been aggravated since her injury, were statements of facts and not of conclusions. The value of such statements was for the jury. We cannot say that plaintiff could not know before her injury that her uterus was misplaced, nor after the injury know that such a condition was aggravated. In May v. C. U. T. Co., 221 Ill. 530, the genital organs of plaintiff became diseased a few weeks after her injury. Her physicians could not say that the conditions they found were or were not the result of external injury and it was said that it "was the correct practice for the

Court to permit appellee to prove the condition of her health from the time of her injury down to the time of the trial, and to submit to the jury the question of the cause of her then physical condition as a question of fact under proper instructions."

If the physical condition of the plaintiff at the time of the trial was as stated by her, and was chiefly, if not exclusively, the result of her injury, we cannot say that the damages are excessive.

The judgment of the Superior Court is affirmed.

AFFIRMED.

tober Term, 1913. No.
539 - 19944

CONRAD REICHARDS,
Appellee,

vs.

ILLINOIS FURNITURE COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

187 I.A. 434

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Reichards bought of the defendant, the Illinois Furniture Company, certain furniture on the installment plan and for the deferred payments gave his promissory note and a chattel mortgage to secure the same on the furniture so purchased. Plaintiff, without notice to or consent of the defendant, while the greater part of the amount due on his note remained unpaid, removed the mortgaged property to 60th street and Prairie avenue and later removed it to 35th and Halsted streets. He then went to Cincinnati in quest of employment and his wife removed the property to Lincoln and Ashland avenues. He then returned to Chicago and was arrested on a complaint filed by the defendant charging him with removing mortgaged property without the consent of the mortgagee, in violation of Sec. 7, Chapter 95, of the statutes of this State. After he was discharged he brought this action for malicious prosecution and had judgment for $100 damages and from such judgment the defendant prosecutes this appeal.

We think that the evidence fails to show want of probable cause for the prosecution, but on the contrary clearly shows that the defendant had probable cause for instituting the prosecution.

As this conclusion requires the reversal of the judgment, it is not necessary to consider the other grounds of reversal urged by appellant.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1913. No.
568 - 19973

MARY A. KEARNEY,
Appellee,

vs.

THE COUNTY OF COOK,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

187 I.A. 435

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiff in her declaration in assumpsit against the County of Cook averred that she passed the civil service examination for nurse or attendant, was placed on the eligible list and appointed nurse or attendant at the Cook County institutions at Dunning April 1, 1910; that she was appropriated for and held such position during the remainder of the year, and in the annual appropriation bill for the year 1911 appropriation was made of $384 for the salary of a nurse at Dunning and board and that the board was worth $15 per month; that August 20, 1911, she was suspended pending charges; that charges against her were made to the Civil Service Commission of the County, which were dismissed October 13, 1911, when she returned to work; that she was prevented from working in said position and from drawing her salary and receiving board from August 20 to October 13, whereby defendant became indebted to her for salary and board so appropriated to her between the dates aforesaid, which the defendant refused to pay, etc. With the special count were filed the common counts and an affidavit of plaintiff that there was due her for salary appropriated $83, etc.

Defendant filed a plea of no
it the affidavit of County Attorney Chir
the defendant had a good defense on the me
plaintiff's demand, and that the nature of the

on August 20, 1911, plaintiff was employed by the county under civil service as attendant at Dunning at a salary of $32 per month and board valued by the County Board at $15 per month. On August 20, 1911, she was suspended. Thereafter charges were preferred to the Civil Service Commission asking for her removal. On October 13, 1911, the charges were heard and plaintiff reinstated without pay. At no time between August 20, 1911, and October 13, 1911, did plaintiff offer her services and at no time did she report for duty. That immediately upon her suspension the position was filled by appointment from the eligible register and the appropriated salary paid to said appointee.

The Clerk's record of April 12, 1913, states that the cause was heard on a motion of plaintiff to strike the affidavit of merits from the files and enter judgment for the plaintiff on the ground that the affidavit did not state sufficient facts to constitute a defense; that the motion was granted and the affidavit of merits stricken from the files. Then follows an order of default for want of an affidavit of merits, assessment of damages by the Court and judgment for the plaintiff for $83 and costs.

Sec. 3 of the Act of Feb. 12, 1853 (Laws of 1853, p. 173) provided that in the Circuit Court of Cook County a plaintiff who had complied with the provisions of the Act should be entitled to a default, unless the defendant, if a resident of the County, should, if the action was on a contract, "file a plea to said action, and also an affidavit setting forth that he believed he had a good defense to said suit upon the merits." Under this statute it was held in McDonnell v. Harter, 22 Ill. 28, that it was reversible error to assess damages as if upon a default while a plea of the general issue was on file, though verified by an insufficient affidavit. In the opinion Mr. Justice Caton said: "If the affidavit of merits filed with

the general issue was insufficient, the plea should have been stricken from the files. While it remained it was a bar to the action." The language of the statute of 1853 is, that the plaintiff shall be entitled to a default "unless the defendant * * * if the suit be founded on a contract, file a plea to said action and also an affidavit setting forth that he believes he has a good defense to said suit upon the merits. Sec. 55 of the Practice Act of 1911 provides that in an action on a contract, express or implied, for the payment of money, if the plaintiff files with his declaration an affidavit, etc., he shall be entitled to judgment as in case of default, unless the defendant files with his plea an affidavit stating that affiant believes defendant has a good defense, etc., and specifying the nature of such defense. The Practice Act requires a different affidavit of merits from that required by the Act of 1853, but we are unable to perceive any difference between the two Acts as to the effect of filing a plea in bar of the action and with it an insufficient affidavit. The decision in McDonnell v. Harter, supra, has not been overruled or modified by the Supreme Court, and on the authority of that case we hold that if it be conceded that defendant was required to file with its plea an affidavit of defense and that the affidavit filed with the plea is defective and insufficient, it was error to enter the default of the defendant and judgment without first striking the plea from the files.

The contention of appellant is that the affidavit filed with the plea states facts which show the nature of the defense, and that the defense thus shown is a good defense to the suit, and that therefore it was error to strike the affidavit from the files and enter default and judgment. The contention of appellee is that her claim was on an implied con-

tract, that until she was discharged "she had an implied contract to be paid the wages appropriated for her."

In Gatheman v. Chicago, 263 Ill. 292, it was held that positions under the Civil Service Act for Cities are not mere employments, but are in the nature of offices, and the right of compensation grows out of the rendition of services and not out of any contractual relation. Under the rule stated in the Gatheman case we think that the defense that the plaintiff did not render or offer to render any service to the County during the period for which she claims compensation in this suit, is a valid defense to the suit, and that the facts set out in the affidavit of merits sufficiently specify the nature of the defense.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1913. No.
369 - 19974

JAMES DUFFY,
Appellee,

vs.

COUNTY OF COOK OF THE STATE OF ILLINOIS,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

187 I.A. 437

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The claim of plaintiff Duffy as stated in his declaration is that he was appointed April 1, 1910, a fireman in the County institutions at Dunning and Oak Forest from the eligible register of the classified civil service of Cook County; that in the annual appropriation bill for 1911 appropriation was made for firemen at the rate of $75 per month and board or $90 without board; that he was prevented from working for the County from January 15 to April 30 and from August 29 to November 30, 1912. With his declaration he filed his affidavit, stating that his suit was for wages and salary appropriated by defendant to him as a fireman and that there was due to him $585, etc. Defendant filed a plea of non assumpsit and with it an affidavit of County Attorney Chindblom, stating that affiant verily believed defendant had a good defense to the suit to the whole of plaintiff's demand. In the affidavit it is set up that under the provisions of the law and the rules of the civil service commission then in force, plaintiff was temporarily absent from the service of the county without compensation from the 15th day of January, 1912, to the 30th day of April, 1912; that during such time the moneys appropriated for firemen were paid to other persons in the employ of the County; that on the 1st day of July, 1912, the State of Illinois obtained title to the institutions at Dunning, and

that on that day plaintiff, who was then employed at Dunning as fireman, voluntarily entered the service of the State of Illinois as fireman at Dunning and continued in such service until the 29th day of August, 1912; that on the 1st day of July, 1912, plaintiff was laid off from the service of the County, in accordance with the provisions of the law and the rules of the civil service commission then in force, and his name placed on the register of eligibles for reinstatement to be appointed whenever a vacancy should occur; that no vacancies since that time have occurred, and that plaintiff still remains upon the eligible register. The procedure in this case was the same as in the case of Kearney v. The County of Cook, in which an opinion is filed with this opinion. The questions presented for our decision in the two cases are the same and for the reasons stated in the opinion in the Kearney case the judgment in this case is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1913. No.
570 - 19975

AGNES McGINNIS HANSON,
Appellee,

vs.

THE COUNTY OF COOK,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

187 I.A. 439

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This case presents the same questions as are presented in Kearney v. County of Cook, in which an opinion is filed with this opinion. The claims of the two plaintiffs are similar, the procedure in each case the same, and for the reasons stated in the Kearney case, the judgment in this case is reversed and the cause remanded.

REVERSED AND REMANDED.

er Term, 1913. No.
1 - 19028.

ROBERT E. BURKE, a minor,
Plaintiff in Error,
vs.
WALLACE M. WATERMAN,
Defendant in Error.

ERROR TO
CIRCUIT COURT
COOK COUNTY.

187 I.A. 440

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

In this case, the plaintiff, a minor, sought to recover damages for a personal injury, sustained by being run over by the defendant's automobile. Upon a trial, before a jury, in the Circuit Court, a verdict of not guilty was rendered, and from a judgment entered upon that verdict, the plaintiff appeals.

It appears from the evidence that at the time of the accident the plaintiff was eleven years and six months old. The declaration does not give the age of the plaintiff, but states that he is a minor, and that while he was upon a public street in Chicago, and was "in the exercise of all due care and caution for his own safety," the defendant so negligently operated his automobile as to run into and injure the plaintiff. It has been repeatedly held in this State that the term "due care," when applied to a child, means that degree of care which a child of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use in the same situation and under the same circumstances. McGuire v. Guthmann Transfer Co., 234 Ill. 125, 129; L. E. & W. R.R. Co. v. Slinkrath, 227 Ill. 439; Illinois Iron & Metal Co. v. Weber, 186 Ill. 526; Star Brewery Co. v. Hauck, 222 Ill. 348.

The court instructed the jury that before the plaintiff can recover, he must prove by a preponderance of the evidence that the plaintiff "was in the exercise of due care,

I = Index.

caution and diligence for his own safety;" that if the plaintiff has failed to prove that fact "he cannot recover in this case;" that the terms "due care, caution and diligence," as used in the instructions, mean "that degree of care, caution and prudence which every person of common prudence bestows upon his own affairs or concerns;" and that "under the issues made by the pleadings in this case, in determining whether the plaintiff was in the exercise of due care, caution and diligence for his own safety, immediately before and at the time he received the alleged injuries, you are not to consider the fact of his age, or youth, but in this case the law is that the plaintiff must prove that he exercised the same degree of care, caution and diligence for his own safety at the time and place aforesaid which any ordinary, careful, cautious and diligent person should exercise for his own safety under the same circumstances." Under the allegations of the declaration, the plaintiff was only required to prove the exercise of such care as the law requires a minor child to exercise under the same or similar circumstances. His age was one of the material facts to be considered in determining whether he exercised such care. Under the evidence in the case, the jury might easily have found that he was not in the exercise of such care as an ordinarily prudent adult person would have exercised under the same circumstances, but that he did exercise such care as a boy of his age, experience, capacity and intelligence would ordinarily exercise under such circumstances. If such were the fact, it was sufficient proof of due care on his part. The instruction to the contrary was clearly erroneous.

It is urged, however, that the case is so clearly one of non-liability upon the facts shown, that the error in this respect should be held to be harmless. There was a sharp conflict in the evidence as to what the plaintiff was doing at and

just before the accident. There was some evidence tending to sustain the plaintiff's theory, as alleged in his declaration. This being true, the plaintiff was entitled to have all such evidence considered by the jury, even if the court was then of the opinion that a verdict in favor of the plaintiff, if returned, would have to be set aside because against the manifest weight of the evidence. Libby, et al. v. Cook, 222 Ill. 204, 213. The instructions peremptorily and erroneously withdrew a material and relevant fact, shown by the evidence, from the consideration of the jury. We must assume the jury followed the instructions, and therefore had no opportunity to weigh and determine the effect of such evidence. Such an error can never be said to be harmless, unless the evidence, including that which is thus erroneously withdrawn, is wholly and clearly insufficient to sustain the cause of action set up in the declaration. The facts of this case do not bring it within the exception.

For the reasons indicated, the judgment of the Circuit Court will be reversed and remanded.

REVERSED AND REMANDED.

that before the accident. There was some evidence tending to
contain the plaintiff's theory, as alleged in the declaration.
This being true, the plaintiff was entitled to have all upon
evidence considered by the jury, even if the weight was that of
the opinion that a verdict in favor of the plaintiff, if return-
ed, would have to be set aside because against the manifest
weight of the evidence. Hiller, et al. v. Doyle, 102 Ill. 403,
the instruction peremptorily and erroneously withdrew a material
and relevant fact, shown by the evidence, from the consideration
of the jury. In such cases the jury failed the instructions,
and therefore had no opportunity to weigh and determine the whole
of such evidence. Such an error can never be said to be harmless,
unless the evidence, including that which the jury erroneously
withdrew, be so fully and clearly sufficient to sustain the cause
of action set up in the declaration. The facts of this case in
that wring in within the exception.

For the reasons indicated, the judgment of the Circuit
Court will be reversed and remanded.

REVERSED AND REMANDED.

Term, 19 , No.
36 - 19415.

CITY OF CHICAGO, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
ALBERT R. TEARNEY, Plaintiff in Error.	)	OF CHICAGO.

187 I.A. 441

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The defendant, Tearney, was found guilty by a jury in the Municipal Court of a violation of an ordinance of the city of Chicago, known as "Section 1541 of the Chicago Code of 1911," and a fine of $20 was assessed against him. To reverse the judgment entered upon that verdict this writ of error was sued out.

It is first contended that the court erred in instructing the jury to the effect that the word "saloon," as used in Section 1541 of the City Code, covers all rooms used by the defendant at the time in question "for the purpose of selling or otherwise disposing of intoxicating liquors." The section thus mentioned is not set out in full in the transcript of the record. It is referred to by number only in the complaint. It was not offered in evidence nor read to the jury, so far as the record before us discloses. Presumably the trial court took judicial notice of that section of the City Code without formal proof, as it is required to do by Section 64 of the Municipal Court Act. The general nature of the ordinance may be inferred, however, from the fact that the court instructed the jury, without objection, that unless the defendant, "on the twenty-eighth and twenty-ninth days of September, A.D. 1912, between the hours of one o'clock and five o'clock A.M. thereof, kept open a saloon, bar-room or tippling house located at No. 336 East 35th street, in the city of

Chicago, and did not lock and keep locked the doors thereof, and permitted persons other than his employes to be and remain therein and did not raise the window shades, blinds and screens thereof, and did not ignite and keep burning a light there so that an unobstructed view of the bar or room could be had from the street," then the jury should find the defendant not guilty. While the Municipal Court Act requires the Municipal Court to take judicial notice of city ordinances, there is no provision in that or any other act, so far as we are advised, requiring or authorizing this court to do so. If a party to a suit in the Municipal Court desires to have reviewed any ruling of that court involving a construction of the language of a city ordinance, such ordinance must be made a part of the record in the same manner as if the suit had been tried in the Circuit Court. The Circuit Court takes judicial notice, for example, of its own rules, but this court does not. The law is well settled in this State that the Appellate or Supreme court cannot take judicial notice of a rule of a nisi prius court unless such rule is made a part of the record by a bill of exceptions, or other document answering the purpose of such a bill. (Sixby v. Chicago City Ry. Co., 260 Ill. 478, 483.) We are unable to see any difference in this respect between a rule of a nisi prius court and a city ordinance. The 6th paragraph of Section 23 of the Municipal Court Act provides that "upon application made at any time within thirty (30) days after the entry of any final order or judgment, or within such further time as may, upon application therefor within said thirty days, be allowed by the court, it shall be the duty of the judge by whom such final order or judgment was entered, to sign and place on file in the case in which the same was entered, if so requested by either of the parties to the suit, either a correct statement, to be prepared

by the party requesting the signing of the same, of the facts appearing upon the trial thereof, and of all questions of law involved in such case, and the decisions of the court upon such questions of law, or, if such party shall so elect, a correct stenographic report of the proceedings at the trial, and a correct statement of such other proceedings in the case as such party may desire to have reviewed," etc. In this case, the plaintiff in error elected to prepare and submit to the trial judge a stenographic report "and a statement of such other proceedings as he desired to have reviewed." This fact appears from the certificate of the trial judge to that effect. It was the duty of the plaintiff in error to prepare and submit a document containing such facts as were before the trial court, and were considered by it in making any ruling which is sought to be reviewed, whether such facts were offered in evidence or were only considered in evidence under the rule of judicial notice obtaining in the Municipal Court. Manifestly, therefore, if he omits from the statement, thus prepared by him and signed by the trial judge, any matter or thing necessary to enable this court to determine whether the ruling of the trial court was correct, in view of all the evidence then before it, the correctness of such ruling is not properly before us for review. In such case, it is our duty to presume that the facts omitted were sufficient to justify the ruling of the trial court. For these reasons, the omission of the full text of the ordinance in question requires us to assume that among its provisions the trial court found language supporting its construction of the ordinance, as given to the jury in the instruction complained of.

It is next urged that the evidence is insufficient to sustain the verdict. Here again we are confronted by the same defect in the record, viz: the ordinance is not in the record.

Assuming, however, that the gist of the ordinance is correctly stated in the instructions, it appears from the evidence that the defendant had a license to keep a saloon at No. 336 East 35th street and another license to keep a restaurant in the same premises, and that he occupied the whole of the first floor of the premises at that number on East 35th street. This floor was divided into three rooms. In one corner was the bar-room proper, which was separated from the main room, or restaurant, by a partition. The evidence is undisputed that this bar-room was locked and kept locked after one o'clock of the nights in question. In another corner of the floor was a kitchen, also separated from the main room by a partition. In this kitchen was what is called a "service bar," from which liquors were served to patrons of the restaurant. It is clear from the evidence that both the restaurant and kitchen were open after one o'clock of the two nights in question; that fifty or more guests were found on each night after that hour seated at the tables eating, and that upon such tables were bottles resembling beer bottles, some partly filled and others empty. This evidence, with the reasonable and legitimate inferences therefrom, is, in our opinion, sufficient to sustain the verdict of the jury, upon the assumption above stated.

It is urged that the court had no jurisdiction of the defendant for the alleged reason that no proper service was had upon him in accordance with the rules of the Municipal Court. While it appears that the defendant entered a special appearance for the purpose of objecting to the jurisdiction of the court on this ground and moved to dismiss the suit for that reason, the transcript also shows that after the motion to dismiss was overruled the defendant went to trial upon the merits. By so doing, he waived his prior motion, and, in legal effect, entered

his general appearance. (Ladies of Maccabees v. Harrington, 227 Ill. 511, 524; Dix v. The People, ex rel., 103 Ill. 425, 429.)

It is next urged that there was no arraignment or plea, such as is required in a criminal case, and that the verdict does not designate the particular count of the complaint under which the defendant was found guilty. These contentions are without force, for the reason that a suit to recover a penalty for violation of a city ordinance is a civil, and not a criminal, proceeding. (City of Chicago v. Knobel, 232 Ill. 112, 114.)

It appears that by a rule of the Municipal Court it is provided that in all suits for violations of ordinances of the City of Chicago a sworn complaint shall be filed before any process is issued, provided, however, that suits "prosecuted by and in the name of the city attorney," may be prosecuted with or without a sworn complaint. This suit was prosecuted by and in the name of the "City Prosecutor," and the complaint was not sworn to. It is contended that because of these facts, the motion to dismiss should have been granted. Several sections of the City Code were offered in evidence, from which it appears that the City Prosecutor is in fact one of the attorneys for the City, and that he is given the authority by ordinance to prosecute suits for violations of city ordinances. The rule must be given a reasonable construction, and it is a matter of not the slightest consequence to the defendant which one of the attorneys for the city prosecuted the suit against him. There is no merit in the contention.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

cber Term, 1913. No.

512 - 19917.

187 I.A. 443

ILLINOIS IMPROVEMENT & BALLAST COMPANY, a corporation,
Appellant,

vs.

INGER C. HEINSEN, Executrix of the Last Will and Testament of HANS HEINSEN, Deceased,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In this case, the appellee has filed a motion to strike the bill of exceptions from the record, upon the ground that it was not filed in time, and a further motion to affirm the judgment of the Circuit Court, if the first motion be granted.

The judgment was entered on April 5, 1913. At that time, appellant prayed for and was allowed an appeal to this court upon its filing an appeal bond, together with its bill of exceptions, within ninety days. The appeal bond was filed two days later. On June 23, 1913, a bill of exceptions was presented to the trial judge for his signature and was marked by him "Presented" on that date. On the same day, an order was entered, on motion of appellant's counsel, extending the time within which to file the bill of exceptions to and including August 15, 1913. The bill of exceptions was signed by the trial judge on September 27, 1913, as appears by his certificate to the same; but it was not filed until October 14, 1913. On October 15, 1913, an order was entered by another judge of the Circuit Court, directing that the bill of exceptions be filed nunc pro tunc as of June 23, 1913. It thus appears that while the bill was presented for signature within the time allowed by the court, it was not in fact signed until approximately six weeks thereafter, and was

not filed until more than two weeks after it was signed. Two questions are therefore presented by the motion to strike: first, was the bill filed in time to become a part of the record of the Circuit Court? and second, did the Circuit Court have jurisdiction at the time it was filed, or thereafter, to order it filed nunc pro tunc as of the date it was presented to the trial judge for his signature?

In Hake v. Strubel, 121 Ill. 321, it was held that the duty of preparing a bill of exceptions and tendering the same to the trial judge for his signature "was, by the statute, cast upon the exceptor, and being matter under his control, the law would not permit an excuse;" that if, however, there was not time, during the term at which the judgment was entered, for him to perform the requisite labor involved in preparing the bill of exceptions, the court could, on application, by its order, extend the time into vacation, or into a succeeding term; that the statute makes it the duty of the trial judge to sign every true bill so tendered; that if the judge should neglect or refuse to sign the same when tendered in apt time, such neglect or refusal would not affect the right of the exceptor to have it signed, even after the time allowed has expired, "for the reason that he had done all that the law required him to do." It was also held, in the same case, that the act of settling and signing a bill of exceptions is an act that is both judicial and ministerial in character, and in so far as it involves the exercise of judicial power, is an act that can only be performed by the judge in term time and when sitting as a court. This doctrine was reaffirmed in Hawes v. The People, 129 Ill. 128; The People v. Anthony, 129 Ill. 218; Village of Marseilles v. Howland, 136 Ill. 81; and in U. S. Life Ins. Co. v. Shattuck, 159 Ill. 610.

In Hall v. Royal Neighbors, 231 Ill. 185, it was said: "It is settled by numerous decisions that if a bill of exceptions is presented to the trial judge at such time that it can be filed within the time allowed by the order of the court, if it is then signed and sealed, the party presenting it will not be prejudiced by any delay or neglect of the court. If the date of presentation appears on the bill, an order may be made whenever it is afterwards signed and sealed, to file it nunc pro tunc as of the date of such presentation to the judge. * * * A bill of exceptions, on its face, purports to be signed at the time the exception is taken in the course of the trial, whether it is presented then or afterward; but if it is presented within the time as extended by the court and that fact is shown on the bill, it may be afterward filed of that date within a reasonable time after it is actually signed."

In Hill Co. v. U.S. Guaranty Co., 250 Ill. 243, a bill of exceptions was presented within the time allowed by the court, and so marked. Three months later, it was signed by the trial judge, and was filed on the same day, without any order permitting it to be filed nunc pro tunc as of the date of presentation. The court held that the principles above stated were applicable to the facts in that case, and held further that in view of the fact that the bill of exceptions was filed within a reasonable time after it was signed, the mere failure to have an order entered at that time granting leave to file it nunc pro tunc as of the date of presentation, did not prevent the operation of the general rule stated in Hall v. Royal Neighbors, supra.

It follows from the principles announced in these cases, that when the appellant presented its bill of exceptions in this case to the trial judge for his signature on June 25, 1915, (which was within the time allowed by the court as extended) it

had done all that the law required it to do at that time. (Hake v. Strubel, supra); and that when the trial judge, on September 27, 1913, signed such bill of exceptions, he had likewise done all that the law required him to do. (Hall v. Royal Neighbors, supra.) But, the mere signing of a bill of exceptions does not, of itself, make the bill a part of the record of the cause. It must be filed, and marked filed, by the clerk of the court, within a reasonable time thereafter. (Hall v. Royal Neighbors, supra.) It was no part of the duty of the judge to see that it was properly filed. That duty devolved upon the appellant, and therefore the failure to file it in time was not due to any neglect or delay of the judge in signing the same, but was chargeable solely to appellant, or its counsel.

What constitutes a reasonable time, under the rule stated, within which to file such a bill of exceptions after it has been signed by the judge, must depend, of course, upon the facts and circumstances of each case. Ordinarily, a day or two ought to suffice in any case pending in the courts of Cook County. In this case, more than two weeks elapsed after the bill was signed before it was filed, and there is in the record no explanation whatever for the delay. This delay was, in our opinion, unreasonable, and so far as this record discloses, was inexcusable; and this being true, it follows that the bill was not filed in time to become part of the record. (Hall v. Royal Neighbors, supra.)

There remains, then, only the question as to what effect, if any, can be given to the nunc pro tunc order of October 15, 1913. The only theory upon which that order can be given any effect is that it operated to extend the time previously allowed by the court within which to file a bill of exceptions. At the

time that order was entered, however, the time previously allowed had long since expired, and the court then had no jurisdiction to enter another order extending the time. Pieser v. Minkota Milling Co., 232 Ill. 139, 142. Upon this point, some doubt existed for a time because of the decision of the Supreme Court in Plotke v. Chicago Title & Trust Co., 175 Ill. 234, where it was held that even after the expiration of the time allowed by the trial court for filing an appeal bond, the court had the power, during the same term in which such an order was entered, to approve the bond and to order it filed, upon the theory that because a court has the power during the term to set aside any order entered at that term, its jurisdiction to approve an appeal bond continued during the term. That case cited, as its authority for so holding, the case of Conductors' Benefit Ass'n. v. Leonard, 168 Ill. 154, which was a chancery case in which it was held that a certificate of evidence is a part of the decree, and could therefore be amended at any time during the term at which it was signed. All doubt upon this question, however, was removed, and the whole matter set right (so far at least as the rule in common law actions is concerned) in the later case of Hill v. City of Chicago, 218 Ill. 178. In that case, the court said, referring to the decision in the Plotke case, supra: "Although that case is not precisely the same as this, we are of the opinion that the rule that a court may during a term set aside orders in a pending cause and make new and different ones in their stead was misapplied. Public policy and the interest of litigants demand that the rule previously adopted shall be adhered to, and where a court, after final judgment, fixes the conditions of an appeal, jurisdiction over the order is retained only until the expiration of the time fixed." Following that case, the court, in Pieser v. Minkota Milling Co., supra, re-stated the rule as announced in the Hill

case, and used the following language in its statement of the rule: "If the term at which the cause was disposed of is adjourned, and thereafter the period first fixed for filing the bill expires without an order providing for an extension being made, the court, subsequent to the expiration of that period, is without jurisdiction to make an order extending the time within which the bill may be presented." The principle of the two cases last cited was applied by the Appellate Court in the cases of Lindquist v. State Bank of Chicago, 138 Ill. App. 446, and Chicago & Riverdale Lumber Co. v. Garside, et al., 179 Ill. App. 40. We conclude, therefore, that the nunc pro tunc order of October 15, 1913, was void and of no effect whatever.

An affidavit has been presented to this court by appellant's counsel for the purpose of showing that in point of fact, the failure to file the bill of exceptions for over two weeks after it was signed was not the fault of appellant's attorneys, but was due to other causes. This affidavit is not a part of the record on this appeal, and this court, therefore, cannot consider it, or any contradiction thereof by counter-affidavits, for any purpose. Chicago & Riverdale Lumber Co. v. Garside, supra; Pardridge v. Morgenthau, 157 Ill. 595. This court sits as a reviewing court only, and has no power to hear evidence upon such points. But even if the affidavit could be considered by us, it does not state any fact or facts tending to prove that the bill of exceptions was not in the possession or control of appellant's counsel from September 27, 1913, the day it was signed, until October 14, 1913, the day it was filed, or to show any reasonable excuse for not filing it during that time. It purports to show "that up to the last minute before filing the bill of exceptions, negotiations were in progress between counsel for the correction of the said transcript of record, and that just prior thereto, it

was agreed between counsel that the bill of exceptions was satisfactory." Why such "negotiations" between counsel should continue for seventeen or eighteen days after the trial court had settled all controversy by signing the bill of exceptions, and (evidently) handing it back to counsel to be filed, is not apparent.

For the reasons stated, the motion to strike the bill of exceptions from the record must be allowed; and, in view of the fact that none of the errors assigned can be considered in the absence of a bill of exceptions, the judgment of the Circuit Court will be affirmed.

BILL OF EXCEPTIONS STRICKEN AND JUDGMENT AFFIRMED.

187 I.A. 444

ERNST R. LINDNER, Appellee, vs. KNISELEY BROTHERS, a corporation, etc., Appellant.) APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This was an action on the case in which the appellee, Ernst R. Lindner, hereinafter called the plaintiff, recovered a judgment for $5,000, in the Superior Court of Cook County against the appellant, Kniseley Brothers, a corporation, etc., hereinafter called the defendant, for injuries sustained in an accident that occurred while certain additional stories were being added to the building known as the Boston Store, in the city of Chicago.

There are but two counts in the declaration, and the defendant contends that the plaintiff cannot recover on either. In view of the fact that counsel for both plaintiff and defendant have treated the second count first in their respective briefs, we will do likewise. The gravamen of the charge in the second count is, that while the plaintiff, in the exercise of ordinary care for his own safety, was working in the elevator shaft several stories below the top, the defendant, through its servants, although they knew, or by the exercise of ordinary care would have known, that plaintiff was working in said elevator shaft and thereby exposed to great danger, should any material fall down said shaft, nevertheless, then and there, without warning to plaintiff, wrongfully and negligently extended a plank about twelve feet long across the top of said elevator shaft in such an improper and careless manner that it thereby knocked and shoved certain bricks from said wall, which bricks in falling struck the plaintiff on the head, inflicting a serious injury.

There is considerable evidence introduced showing the positions of the different employes working about said building. Employes of the Otis Elevator Company, among whom was the plaintiff, were working inside the shaft about the third floor from the top, upon a temporary scaffold composed of two planks, 12

inches wide, extended across the hatch from east to west. The ends of these planks were supported by two timbers extending from north to south, which timbers were supported by hooks or hangers attached to the beams in which the holes were being drilled. The employes of the defendant were engaged at the time in preparing to place a skylight over all the elevator shafts, including the one in which the plaintiff was working.

The plaintiff, in order to prove the act of negligence complained of, placed upon the stand one of the employes of said defendant, namely, John Hoyer. Said Hoyer and one Walter H. Moore following the directions of their foreman, were employed in erecting a scaffold above the elevator shaft, so that men could stand on it to put in the skylight; the wall around the elevator hatches extended about eight feet above the roof; they first erected a scaffold on the south wall of the shaft by putting some planks across two horses, each six feet high; the witness, Hoyer, then began, with the assistance of Moore, to place the plank across the shaft in which the plaintiff was working; Moore handed the plank to Hoyer, who says that he stood with one foot on the scaffold, which was on the outside of the south wall, and one foot on an old board across the east side of the hatch, which, according to Hoyer's testimony, was already there; Hoyer put the north end of the plank down first and then put the south end down, and just as he started to walk back, two or three bricks came down. On cross-examination, over the objection of the plaintiff, Hoyer testified that in letting the end down on the south wall he lowered the board lightly; that he looked into the shaft before he placed the plank there and saw no one in the shaft. He did, however, see a wire screen, which he judged to be the top of an elevator or something else that the elevator constructors were using. The work of Hoyer and Moore was started

Said Hoyer and one Walter H. Moore

immediately after dinner, namely, shortly after 12:30 p.m.

The testimony of the plaintiff shows that he and others had been working in this particular shaft on Monday and up to noon on Tuesday, the day of the accident, and resumed their work in the shaft immediately after the noon hour, which was 12:30. He further testified, and in this he is corroborated by other witnesses, that there was no covering in the shaft above where he was working, and that the wire screen in that shaft was the top of the freight elevator, which was the only elevator in operation in the said building at that time, and was below them while they were working at the time of the accident. At the very time Moyer claims there was no one in the shaft when he looked down, the testimony of other witnesses in the case who were in a position to see, was to the effect that plaintiff was in the hatch and stood upon the scaffold erected therein. Moore, who was employed with Moyer in putting the plank in place, only testifies to the effect that he assisted Moyer in erecting the scaffold on the outside of the south wall; that he handed the plank to Moyer, who was above him, and that he then turned away. He, Moore, did not hear of the accident until about half an hour after it took place. Several of the witnesses, including Mulholland, superintendent of the defendant company, do not corroborate Moyer and Moore with reference to the erection of the scaffold on the outside of the wall. Mulholland also testified that the wall surrounding the hatch had been up about ten days. However, Wetterlund, the mason foreman, who was employed by neither the plaintiff or defendant, stated that as far as he could remember the wall had been completed three or four days before the accident. No testimony was given in any way attacking the manner in which the wall had been erected or the material employed therein. There is no apparent contradiction in the evidence

offered by the plaintiff that at least six or seven bricks fell out of the side of the south wall down the shaft, making a V-shaped hole in the wall about 12 or 14 inches from the top, in which hole the plank was found resting after the accident. (Moyer, in his testimony, stated that immediately after he let the plank down lightly on the south wall, two or three bricks fell down.)

It is strongly urged by the defendant that the plaintiff cannot recover on the second count because of the testimony of Moyer, an employe of the defendant, who testified, in so many words, as follows: "I placed the north end on the north wall and then I placed the south end on the south wall. I let it down lightly on the south wall. I got over towards the south end and laid it down lightly. * * * I looked down the hatch before I put the plank over and didn't see anybody down there." fendant contends that the foregoing was the only testimony on the subject as to how the plank was handled; moreover, that it was the plaintiff's own evidence.

This testimony, however, was given on cross-examination, over the plaintiff's objection. The trial judge evidently allowed the widest latitude to the defendant's attorney, even though the witness whose act it was charged was negligent, had been an employe of the defendant.

The plaintiff answers the argument, when he says that to hold the defendant at all he must first show that the act complained of was performed by the defendant or some servant of the defendant. It does not appear anywhere in the evidence that anyone saw Moyer place the plank down. Moore who was working with him at the time, expressly states that he did not. Consequently, the plaintiff was compelled to place Moyer on the stand. We are firmly of the opinion that under the circumstances,

the testimony relied on by the defendant, and which was brought out on cross-examination, is not conclusive.

The plaintiff contends, and in our opinion rightfully so, that all the circumstances surrounding the entire transaction must be taken into consideration in arriving at a conclusion in reference to the alleged negligent act of Hoyer and Moore in placing the plank across the shaft. There was a wall which had been completed anywhere from four to ten days prior to the accident, made of good mortar and brick. Perhaps it did not seem reasonable to the jury that six or seven bricks would fall out of the inside of the wall at a mere touch of a plank lightly let down upon said wall. We have previously stated that there was a contradiction of the testimony given by Hoyer and Moore as to the scaffold being on the outside of the south wall, and among the witnesses so contradicting was Mulholland, the defendant's superintendent. We mention this because of the point made by the plaintiff that if there had been no scaffold there, the likely manner in which the plank would have been placed in position was, that it would be simply shoved across the top from one side to the other, the persons doing this standing below the top, in which event it could not have been handled lightly and no precaution could have been taken by the person so handling the plank so as to look down the shaft to see whether there was anyone working there.

There is no question that if Hoyer was in the position he claims he was in at the time he placed the plank on the south wall he could have seen who was in the shaft if he had looked, as he claimed he did. He must have been standing directly over the shaft, and there was no obstruction between where the men were working and the top of the shaft. Hoyer says that he saw a wire screen, but that is explained by the

testimony of other witnesses, who say that the wire screen was at the top of the freight elevator and that it was below the men in the shaft. If the jury did not choose to believe the testimony of Hoyer to the effect that he let the end of the plank down lightly, but from all the facts in evidence arrived at the conclusion that Hoyer must have been negligent in the manner in which he handled the plank, we cannot, as a matter of law, say that such conclusion was manifestly against the weight of the evidence.

The defendant further contends that the jury were not warranted in arriving at the conclusion that the act of Hoyer, if it constituted negligence, was the proximate cause of the injury. It is contended that Hoyer could not foresee or anticipate that any bricks were likely to be dislodged from the wall as a result of the manner in which the plank was put on top of the wall across the shaft; therefore, this act cannot be regarded as the proximate cause of the injury; that an act to be the proximate cause of the injury must be foreseen or anticipated by the person committing the act, and that some injury therefrom would be a probable or natural consequence. They urge in support of this argument several authorities, the chief one being apparently the case of Smith v. Commonwealth Elec. Co., 241 Ill. 252. That case differs so widely from the case at bar, in the facts, that it is not in point.

The jury evidently believed that Hoyer, in placing the plank in position, did it in a manner that caused the bricks to fall down the shaft and that such act constituted negligence. Mulholland testified that he looked down to see if there was any one working there in the shaft before his men started to work there. Hoyer was one of his men. This was before the work was started. Defendant and its servants therefore had

knowledge, or in the exercise of ordinary care would have had knowledge, that work was being done or might be done in the shaft. Mulholland's testimony alone shows that he as Hoyer's foreman realized that when work was being done above the shaft, that it might reasonably have been foreseen or anticipated that any person in the shaft might be injured as a result of an act of negligence, committed in and about working above that shaft, as defendant's servants were at the time of the accident. We cite in support of our conclusion the case of Heiting v. C. R. I. & P. R.R. Co., 252 Ill. 488:

> "It is not, however, essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen. If the consequences follow in unbroken sequence from the wrong to the injury, without any intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from the negligence."

The reasons given by which the jury might arrive at the conclusion, and rightfully so, that the act of Hoyer was negligent, are just as forceful in warranting the jury to arrive at the conclusion that the negligent act of Hoyer was the proximate cause of the injury.

We now come to the first count in the declaration. The averment of the first count is that while the plaintiff was working in the shaft, and while in the exercise of ordinary care, the defendant, or its agents, should have known, or by the exercise of ordinary care would have known, that the plaintiff was working in said shaft, and that they should have notified and warned plaintiff before they undertook to extend or place the plank across the top of the shaft, so that he might either seek a place of safety or place a sufficient covering over the point where he was working and thus protect himself; "and thereby avoid any material that might fall down the shaft while the

plank was being placed, but that the servants, in disregard of their duty, wrongfully and negligently failed and neglected to so notify the plaintiff, but upon the contrary, they undertook to place and extend the plank over and across the top of the shaft without notice or warning to plaintiff."

The plaintiff in that count also alleges that the custom then prevailing required that the defendant, through its servants, should notify or warn the plaintiff before undertaking to do the work in question. The gravamen of this charge practically is the failure on the part of defendant to warn the plaintiff before placing the plank in position. Necessarily, the facts upon which this count is based are the same as those of the second count, with the following exception, namely: the testimony offered by the fellow-employes of the plaintiff that it was the general custom for men engaged in the erection or repair of buildings to give notice to men working below them in such a shaft before starting to work over their heads, so that if the work thus performed overhead was of a temporary character the person warned might leave the shaft, or if the work was of a lasting character such person might arrange for a sufficient covering to protect himself while working in the shaft from any material that might fall by reason of the work of any person overhead; and also the testimony that no warning of any kind had been given before the plank was placed in position.

To the admission of testimony of the general custom the defendant objected and his objection was overruled. The defendant has assigned this ruling of the court as error so serious that it should require the reversal of the case. There can be no question, as heretofore pointed out, that the defendant's servants had an opportunity, had they looked into the shaft, to warn the plaintiff and his fellow-employes at that time in the shaft with him. As we have stated before, we think if Moyer was

in the position that he claims to have been in when he placed the plank, and had he looked, he must have seen the plaintiff. There can be no doubt about the fact that no warning or notice of any kind had been given by the defendant at the time they were employed in placing a plank there, or immediately prior thereto. Did not the plaintiff then have the right to show how men employed in an occupation of this kind would act under like circumstances, so as to have the jury properly pass upon the question as to whether the defendant's servants at the time and place were exercising that degree of care the law required of them, and also, as bearing upon the question whether the plaintiff was in the exercise of ordinary care at the time and place in question. How better could it be done than by introducing testimony as to what was the general custom among men engaged in the erection or repair of buildings to give notice to men working below them as this man was in the shaft? In support of their objection to testimony of this kind counsel rely, in addition to several cases of foreign jurisdictions, upon two decisions of our courts, one being the case of Chicago & Alton R.R. Co. v. Harrington, 77 Ill. App. 490. A reading of this case will show, however, that it was not in any way controlling, as far as the facts in the case at bar are concerned. Moreover, while the case was reversed, it was not because of any error as to a question permitting evidence as to a general custom - it was reversed because of an instruction entirely apart from the question of general custom. The case was afterwards retried, a verdict was again rendered for the injured party, and the case appealed successively to the Appellate and Supreme courts. On the retrial of the case the same question was asked as to general custom, yet it was affirmed in both courts, and the court did not find said question objectionable.

question of instruments.

The other case relied on is Beidler v. Branshaw, 200 Ill. 425. A reading of the language quoted by counsel for appellee in their brief will show that that language is not inconsistent with the admission of the testimony as to custom in the case at bar. Moreover, we are strengthened in our opinion that the evidence as to a general custom is competent by the case of Yeates v. I. C. R.R. Co., 241 Ill. 208, wherein evidence of a general custom was permitted and the violation of it held as an act of negligence.

> "There was no rule of the defendant on the subject, but in considering the question whether the act of the switch-tender was negligent and whether the switching crew ought to have anticipated meeting the road-engine, it was proper to consider the existence of the custom."

As we have stated, we believe that this testimony is competent, as bearing upon the question as to whether or not the servants of the defendant and the plaintiff himself were in the exercise of ordinary care at the time and place in question. The men in the shaft were working in apparent security. In the morning no work was being done on that skylight. The plaintiff had received no warning of any kind or any notice that work was going to be done on that skylight. If men experienced in this line of work, namely, in the erection or repair of a building, when it came to their attention that people were working below, were in the habit and custom of giving notice of the time when they began their work, should not the jury have the benefit of such testimony so that they might properly determine the questions involved in this case? The first knowledge the plaintiff could have had of anybody working above him, according to the testimony in this case, was practically simultaneous with the falling into the shaft of the bricks which brought about the injuries he sustained. The value of that testimony is exemplified in this case when, at the very first act of the defendant's servants working above the plaintiff, there

was the consequent accident and injury. Objection is also made that even though evidence as to the general custom was competent, yet the witnesses themselves were not competent to testify as to a general custom. We have examined this testimony carefully and do not believe that the testimony is subject to this objection. We are further fortified in this view by reason of the testimony of Mulholland, defendant's superintendent, which is as follows:

"THE COURT: You say you looked down that shaft to see if there was anybody down there?

A. Yes, sir.

THE COURT: For what purpose?

A. To warn them before my men started to work above them, which it is customary to do.

THE COURT: Is that a general custom?

A. Yes, your Honor."

His evidence clearly recognized the existence of the custom concerning which the witness of the plaintiff testified. We are firmly of the opinion that whether or not the act of the defendant or its servants in undertaking to place this plank across the shaft in the manner set forth in either count of the declaration constituted negligence, and if so, whether such act was the proximate cause of the injury, were questions of fact necessarily to be determined by the jury, and we cannot say that the verdict of the jury is manifestly against the weight of the evidence, and the jury having determined these questions of fact adversely to the defendant, we believe there was evidence which fairly tends to warrant the jury in arriving at said conclusion.

Counsel also urge that there was error in the refusal of the court to give instruction No. 23. We have examined this instruction carefully, as well as all the other instructions given on behalf of both the plaintiff and the defendant, and believe that the subject matter of said instruction is fully covered by instruction No. 4, given on behalf of the defendant.

The defendant finally urges that the damages awarded in the verdict are excessive. The defendant merely urged this point in general terms. The plaintiff answered the same with considerable particularity. We have carefully read over the medical testimony offered and also the testimony of the plaintiff as to his condition. This question was clearly one for the jury to determine and should not be disturbed unless it is manifestly against the weight of the evidence. Moreover, the trial judge did not disturb the verdict, and we therefore conclude that he did not believe that the damages were excessive. We cannot say, as a matter of law, that the jury were not warranted in awarding damages in the sum of Five Thousand Dollars.

Finding no reversible error in the record, the judgment of the Superior Court will be affirmed.

AFFIRMED.

ch Term, 1918, No.
373 - 19407.

117

ANNA VON DER OSTEN, Administratrix of the Estate of MAX VON DER OSTEN, Deceased,
Appellee,
vs.
OSCAR DANIELS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY.

187 I.A. 446

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This was an action brought by the appellee, Anna Von Der Osten, as administratrix of the estate of Max Von Der Osten, deceased, in the Circuit Court of Cook County, against the appellant, Oscar Daniels Company, for damages on account of its alleged wrongful act in causing the death of the deceased. A jury awarded the appellee a verdict of $5,000 and judgment was entered on the verdict.

The appellee's (hereinafter called the plaintiff) cause of action is set forth in one count, and is in substance as follows: The plaintiff's intestate, Max Von Der Osten, was employed as a carpenter by the Rudolph S. Blome Company, doing work on the Albert Schwill malt-house, carrying boards near a certain opening or shaft; that Oscar Daniels Company, the appellant (hereinafter called the defendant) were at the same time doing certain iron work on said malt-house; that the defendant's servants were moving and manipulating a certain beam or leg; that it was the duty of said plaintiff in the operation or manipulation of said beam or leg to use due care, well knowing that plaintiff's intestate was carrying boards in close proximity to said leg; that the defendant, by its servants, failed in that regard, but on the contrary, while the plaintiff's intestate, in the exercise of all due care and caution for his own safety, was carrying certain boards at or near said leg and at a point where the defendant could see the plaintiff's intestate while he was underneath the said leg, the servants of the said defendant then and there carelessly and negligently, well knowing the premises or being in a position to well know them, moved or loosened or manipulated the said beam or leg so that the same fell down and upon and against the boards which the plaintiff's intestate was carrying, by reason of which the plaintiff's in-

testate lost his balance and fell into a shaft or opening a distance of about seventy feet and died as a result of the injuries sustained in said fall. During the trial, the plaintiff asked leave to amend the declaration by striking out the word "underneath" (above underscored) and substituting the word "near."

The plea of general issue was ordered to stand to the declaration assuming it to be amended, and leave given to the defendant to file a special plea of the statute of limitations, which was done. The plaintiff then asked leave to file a demurrer, and the court assuming that the demurrer would be filed, sustained the demurrer. No actual amendment was filed, nor was the declaration amended on its face, nor was any written demurrer actually filed.

The plaintiff, at the conclusion of his brief, sets forth five reasons why the judgment should be reversed. Inasmuch as the first two reasons urged by the defendant require a discussion of the evidence, we will consider them together, and, as in our view, such a discussion will necessarily involve both of the reasons urged, we will consider them at one time. They are as follows:

> First - That appellee failed to prove her case, as alleged in her declaration, and in fact failed to show what caused Von Der Osten to fall down the shaft.
>
> Second - That even if negligence had been shown on the part of appellant, the utter lack of ordinary care and caution, on the part of deceased, for his own safety would bar the right of appellee to recover in this action.

The accident occurred on December 11, 1909, between the hours of ten and eleven o'clock, in a building known as Schwill's malt-house, at South Chicago. The building in which the work was being done was very large and very high. The defendant's employes and the plaintiff's intestate were all at work on the same floor, namely, the bin floor, which was about seventy feet

above the main floor. The room in which they worked was about seventy feet north and south and ninety-five to one hundred feet east to west. The floor was all in on the bin floor, except one or two sections in the southeast corner. In the center of the room and against the south wall was an open shaft extending from the bin floor down to the main floor, a distance approximating 70 feet. The opening in this shaft was 14 feet square. The iron columns supporting the building were all placed 14 feet apart, and this open shaft which was to be used for the erection of a permanent stairway and elevators was the size of one of these sections. At the time and place of the accident, the plaintiff's intestate, Von Der Osten, who was employed by the Rudolph S. Blome Company as a carpenter, was making forms for concrete to cover the section of the floor immediately to the east of the open shaft previously referred to. In the northwest corner of the room was a pile of lumber made up of 2x12 planks, and at the very time of the accident he was employed in carrying lumber from this pile to the section where he was to put in the forms for concrete, namely, the section immediately east of the open shaft. The defendant's employes at the time and place in question, were employed in the erection of a grain chute which, when erected, would run from the bottom of the building to the roof. On the morning that the plaintiff's intestate met his death, the employes of the defendant were working on the section of the chute that was to pass through the room in which they were all at work. The chute was practically made up of what the workmen termed "square legs;" they were, in fact, however, oblong. The leg on which they were working at this time was made up of several sections, which were being riveted together during the morning of the day of the accident and just prior to the accident. In the process of riveting, it was necessary to turn the leg from one side to the other, and

it had already been turned several times previous to the turn which, it is claimed, caused the accident. The men employed in doing this iron work were John Driscoll, Fred Johnson and Alexander Green. To the north of where these men were working, about the north of the center of the shaft, a witness for the plaintiff, by the name of George W. Bugg, was working. He was employed in sawing an iron door, and stated he was about ten feet north of the leg, and had been on the floor about twenty minutes before the accident happened. This accounts for all the men on the floor, as far as the testimony shows at the time of the accident.

The controverted questions of fact in the case which necessarily had to be determined by the jury were these: namely, the route taken by the deceased in carrying the board or boards from the northwest corner to the section where the forms for concrete were to be put in, the manner in which he was handling the board or boards, and the place and position he was in at the very time of the accident. ~~And further as to the position that the iron leg was in on which the defendant's servants were working.~~ Also the position that the iron leg occupied on the floor north of the elevator, and on which the defendant's servants were working at the time of the accident. There may be other controverted questions of fact in the record, but we feel that these above mentioned are determinative of the issues raised on the first two points of appellant's brief. The witnesses in the case were few in number. We will first take up the question as to the position of the deceased and the manner in which he was doing his work. The principal witness on behalf of the plaintiff was one George W. Bugg, who was also working as a carpenter in the building on this floor. He states that that morning he saw the deceased carrying lumber from the pile in the northwest corner to the

northeast corner of the elevator shaft; that he had practically constructed a pile of lumber across the northeast corner of the shaft; and that this lumber was to be used in putting in the forms for the concrete floor in the section just east of the elevator shaft. He placed the leg upon which the defendant's servants were working north of the shaft and against the northeast column of the shaft, in a reclining position. He says that the west end of the leg extended about two or three feet beyond the northeast corner of the shaft; that the balance of the leg was to the east of the shaft and that the leg was about twenty feet long. He speaks about it being made up in two sections, and that on one section, on the west end, was a sort of a throat coming out, making it a little bit larger on that end. This fact as to there being a throat or an enlargement on the west end of this leg is strenuously denied by two of the witnesses for the defendant, who were at work on this leg at the time of the accident. He further testifies that just before the accident he saw the deceased carrying lumber (and he usually carried two pieces of lumber at a time on his shoulder), from the northwest corner and proceed in a southeasterly direction to the northeast corner of the shaft and started shoving the board or boards on to this pile of lumber which was lying catty-cornered across the northeast corner of the shaft. At this time there were six or seven boards on this pile. The boards were probably 18 or 20 inches distant from the leg. When he last observed the deceased before the accident his back was towards the witness. His right hand was on the north side of the board and his left hand was on the south side of the board. He was shoving the board or boards diagonally and still had six or seven feet of the board to push over on the pile; that he just got his eyes off when he heard the noise, looked up and hollered "man down," and saw the deceased kind of half turn,

going down sideways and backwards. The noise he heard was the leg going down on the iron beam. The foot was pulled out from under and it slid down the column and fell towards the left. The plaintiff also introduced the testimony of one Driscoll, by way of reading from a deposition taken on behalf of the defendant. The gist of that testimony was to the effect that he did not know what caused the deceased to fall, and in response to a direct question as to whether the leg they were working on touched him, the deceased, he answered he could not say as to that, for he did not see it. He did not think the leg was close enough to him to hit him. Presumably, the plaintiff below offered this testimony to show that the defendant's witness was uncertain as to whether or not the leg hit the deceased.

The defendant's witness Johnson, upon whom they rely most, places the leg at least 10 to 12 feet north of the shaft, and extending across the entire width of the shaft, namely, 14 feet; the end on the east extending beyond the column on the northeast corner, a little more than the corresponding end on the west beyond the northwest corner of the shaft. He also said that the sections of the legs which had already been placed in position protruded through the floor to the height of three or four feet at the northeast and northwest corner of the shaft to the north of the iron column marking the northeast and northwest corners of the shaft. The defendant attaches importance to this fact because Johnson claims that this leg was to the north of the column of the shaft. Defendant contends that in pushing the leg to the north, these upright sections (so protruding) would hold it to the north and prevent it from coming to or close to the said iron column. Johnson testifies, as well as does Driscoll, another witness for the defendant, that they had seen the deceased working around the shaft, carrying lumber, and pass[illegible] be-

tween them and the shaft many times. They also testified that there were single planks lying across this shaft. Johnson testified that he had seen the deceased carrying lumber to the east of the shaft crossing over on the planks that were lying over the shaft. Driscoll also testified that that morning he had seen the deceased passing over planks across the shaft, and Johnson says the last time he saw the deceased just before the accident was about as he was half way across the middle of the shaft carrying these boards, namely, directly over the opening, going down 70 feet, and that at that time they dropped the leg, namely, turned it as was necessary for riveting, and he went down. All the witnesses agree that the fall of the deceased down the shaft was simultaneous with the turning of the leg. This is Johnson's testimony on the point:

> "Q. Had you seen him just before the accident, or at the time of the accident did you see him?
>
> A. Yes.
>
> Q. Where was he?
>
> A. He was in the middle of the plank at that time we turned that leg over. That is the time, just the same we dropped that leg. That is the time he went down. That is the only thing I know of. I noticed him because he made a holler when he went. I hollered to Driscoll 'A man went down the hole'."

Driscoll does not corroborate Johnson as to where the deceased was at the time the leg was turned, nor does he entirely corroborate him with reference to the position of the leg. In fact, during the testimony he repeatedly says, either on the direct or cross-examination, that the west end of the leg extended about five or six feet west of the northeast corner of the shaft. The testimony of Alexander Green, the other employe of the defendant, corroborated Johnson as to the fact that the leg extended across the entire width of the shaft. The plaintiff introduced signed

statements of Johnson and Driscoll tending to impeach their testimony, one statement, the statement of Driscoll, being to the effect that he worked with Johnson; that this leg was lying against an iron column; that the leg was lying on a corner and leaning against one of the iron columns; "we pulled out the bottom of the leg and this allowed it to fall." The statement of Johnson which was offered in evidence as tending to impeach him was, that he heard a crash of lumber falling or breaking just as they let the leg down. He was only a few feet from him, the deceased, at the time, but he was behind and at one side. "Our leg was projecting past a column against which it was leaning towards the opening, and the man had been walking past it." If the signed statements of these witnesses were true, they tend to corroborate the testimony of the plaintiff's witness, Bugg. In order to give force to the contention of the defendant that the verdict was against the weight of the evidence, it must be argued that the jury must have placed absolute faith in the testimony of the witnesses of the defendant. The defendants urge that the jury should be assumed, by its verdict, to have arbitrarily attributed the fall of the deceased down the shaft to the turning over of the leg. They suggest it might have happened in a number of other ways just as likely, and therefore the jury could only arrive at this conclusion by way of speculation, that is, viewing the accident as having taken place in the manner described by Bugg. If the accident took place as defendant's witness Johnson says it did, with the plaintiff on the plank placed about midway across the shaft, then, of course, there could be no recovery, on the charge as laid in the declaration. There is in this case the positive testimony of the witness Bugg and against it the evidence of Johnson, Driscoll and Green. There is also in evidence the statements of Johnson and Driscoll made before the trial, which statements tend

to impeach their evidence and corroborate that of Bugg. The jury evidently believed the testimony of Bugg.

Defendant further contends, however, that if the accident took place under the circumstances stated by plaintiff's witness Bugg, still the plaintiff could not recover because the deceased was guilty of contributory negligence. The contend that the deceaded being there all morning must have seen the defendant's servants at work; must have seen the leg turned several times before the last time, when, simultaneous therewith, he fell down the shaft. We do not question that he did see the defendant's servants at work. Nor can there be any question but that the deceased, in doing his work, was seen by the defendant's servants. There is no question that these men were all engaged in doing their work in plain sight of each other. They were all bound to exercise ordinary care, not only for their own safety, but also with regard to the manner in which they did their work with regard to the safety of others on the floor, of whose whereabouts they knew. There is evidence in the record tending to show that the deceased was a careful and prudent man, and apparently did his work in a workmanlike manner. Under the evidence in this case, the question of contributory negligence was a question of fact for the jury to determine.

We cannot say, as a matter of law, that upon either of the two points just discussed, that the verdict is manifestly against the weight of the evidence.

There are three remaining points urged by the defendant. The defendant complains that the court committed error in giving instruction No. 1, on behalf of the plaintiff. The part of the instruction complained of is as follows: "The law did not require of plaintiff's intestate the highest degree of care." While the instruction would have been just as good, and possibly in better

form without the sentence, yet it has never been held erroneous, and was approved in C. & A. R.R. Co. v. Pearson, 184 Ill. 393. In addition, however, the 11th instruction given on behalf of defendant clearly places before the jury the degree of care the defendant contends the plaintiff's intestate was compelled to exercise.

Defendant also complains of the action of the court in refusing an instruction based upon Illinois Central R.R. Co. v. Swift, 213 Ill. 307. That was a master and servant case, and announced a principle which can have no application to the case at bar, wherein no such relation existed. We believe this instruction was properly refused.

Upon the last point made by the defendant that there is a material variance between the declaration and the evidence, we do not believe that there is any material variance. This is on the assumption that the declaration was never in fact amended. In any event, should this court be asked to treat the amendment as not having been made, when the defendant in every way so regarded it? In the first place, he filed his plea of the statute of limitations to the amendment. The record also shows that the plea of general issue was ordered to stand to the declaration as amended. The record also shows that the demurrer was sustained to the plea of the statute of limitations, but more than that, the plaintiff offered an instruction which clearly recognized the amendment, namely, instruction No. 14, given on behalf of the defendant, where they ask the court to instruct the jury that the only charge of negligence against the defendant was that presented in plaintiff's amended declaration, and in the body of the instruction is used the word "near" instead of "underneath", which constituted the entire amendment to the original declaration.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

187 I.A. 460

HYMAN LEW,
Appellee,

vs.

JACOB KATZ, JOSEPH KATZ, L. P. ELLMAN, D. M. SMITH, S. E. ELLMAN, SIDNEY M. WEIL and MORRIS KATZ,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action of the first class in the Municipal Court of Chicago, brought by Hyman Lew, appellee, (hereinafter referred to as the plaintiff) against Jacob Katz, et al., appellant, (hereinafter referred to as the defendants) to recover on a promissory note for $1200 signed by the defendants and made payable to the order of themselves and by them endorsed. The amended statement of claim states that the plaintiff's claim is for money due on a note signed by the defendants; that the note is the property of the plaintiff, who purchased the same from the Continental and Commercial National Bank. The affidavit of merits of the defendants (signed and sworn to by Jacob Katz, one of the defendants) denies upon information and belief, that the plaintiff is the lawful owner and holder of the note sued upon, and denies, upon information and belief, that the Continental and Commercial National Bank was an innocent purchaser, holder or owner of the said note; alleges the fact to be that one A. Revken became the owner and holder of the note at the time of the execution thereof; further alleges, on information and belief, that the said Revken is still the owner of the note and that neither the plaintiff nor the said bank was ever the purchaser, or holder, or owner of said note, nor did either of them ever give any value for said note; further alleges, on information

and belief, that the said note was taken up at the said bank, where it had been sent for collection, with funds belonging to the said Revken; and alleges that the defendants have a good and meritorious defense as against the said Revken.

On November 26, 1912, the defendants appeared before one of the judges of the Municipal Court and waived a trial by jury, and the case was set for trial before Judge Turnbaugh, one of the judges of that court, for November 27, 1912. On this last date, the defendants moved for a change of venue from the said judge, which motion was granted, and the case was then transferred to Judge Beitler, one of the judges of said court, for trial. On the morning of November 27, 1912, Judge Beitler called the case for trial, and the defendants' counsel requested that the hearing of the case be postponed until the afternoon of the same day, in order that he might attend a hearing of a case in the Criminal Court of Cook County. The court granted this request, and the case was set for hearing at 3:30 P. M. of the same day. No objection was made by defendant's counsel to this setting of the case. The case was called for trial at the time set and the defendants' counsel made no objection to an immediate hearing of the cause. The plaintiff then introduced sufficient evidence to make out a prima facie case and rested. Defendants' counsel then moved the court that the further hearing of the case be postponed, for the reason that the counsel desired to cross-examine the plaintiff under section 33 of the Municipal Court Act, and that he had expected the plaintiff to be present in court during the trial, as the counsel for the plaintiff "had given out" a day or two before, at the time of the preliminary call of the case, that the plaintiff would be in court at the time of the trial of the cause, and it appeared that the plaintiff was not in court. Counsel for the plaintiff then stated to

the court that he had not made the statement attributed to him by defendants' counsel. The court thereupon overruled the motion for a postponement of the hearing, to which action of the court the defendants excepted. Counsel for the defendants stated that it would be impossible for the defendants to go on with the hearing "inasmuch as the case was not called for trial until 3:30 o'clock in the afternoon, the regular hour of adjournment of the court being five o'clock, and the following day, Thanksgiving day, being a legal holiday, the material witnesses from Continental and Commercial National Bank, by whom defendants expected to prove that plaintiff never was the owner of the note sued upon, as alleged in plaintiff's statement of claim, who had been subpoenaed for the day before and excused to be called when the case was reached, could not be called into the court that day; that defendants would be ready to go on the day after Thanksgiving." The court thereupon overruled the motion for a postponement of the hearing, to which ruling the defendants excepted. The defendants offered no proof and the court found the issues in favor of the plaintiff. The defendants made no motion for a new trial, and judgment was entered on the finding, in favor of the plaintiff, in the sum of $1288. This appeal followed.

Defendants assign two reasons why the judgment of the Municipal Court should be reversed: First, that the defendants were not permitted the opportunity of cross-examining the plaintiff as provided by section 33 of the Municipal Court Act; second, that the court committed an abuse of discretion in overruling defendants' motion for a postponement of the hearing.

Section 33 of the Municipal Court Act ~~of Illinois~~ reads in part as follows:

> "That upon the hearing of any suit in the Municipal Court any party thereto * * * may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify."

If we correctly understand the position of the counsel for the defendants, in reference to their first assignment of error, it amounts to this: that under the provisions of the above section, the plaintiff and defendant in a case must be in court at the time of the trial of a case, in order that either side may have an opportunity, (should it see fit to take advantage of the provisions of section 33) to cross-examine the adverse party. We find nothing in the section to sustain this contention of the defendants. The section plainly provides that if one party desires to cross-examine the adverse party, it may secure the attendance of such party in the same manner that the attendance of witnesses is ordinarily obtained. There is nothing in this record to show that the defendants were unable to secure the attendance of the plaintiff by ordinary methods. Had the defendants, at the proper time, made a proper showing that they were unable to secure the attendance of the plaintiff, and that they desired to cross-examine him, a different situation would have been presented. The court, under such circumstances, would have undoubtedly protected the rights of the defendants in the premises.

As to the second error assigned, it is obvious that the contention of the defendants is without merit. We are satisfied, from the record in this case, that the appellee is justified in his contention that this appeal was prosecuted merely for delay. The judgment of the Municipal Court will be affirmed, with statutory ten per centum damages, it being obvious that this appeal was prosecuted for delay.

AFFIRMED WITH TEN PER CENTUM DAMAGES.

187 I.A. 461

ANNA M. ELLIS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellee, Anna M. Ellis, (hereinafter referred to as the plaintiff) recovered a judgment in the Superior Court of Cook County against the appellant, Chicago Railways Company, (hereinafter referred to as the defendant) for $4,000 in an action on the case. The case was tried before a court and jury, and a verdict was rendered in favor of the plaintiff for $6,000. A motion for a new trial was made by the defendant, and the court denied the same on the condition that the plaintiff remit $2,000 from the verdict. The plaintiff filed a remittitur for $2,000, and the judgment from which this appeal was taken followed. The accident for which the plaintiff sued the defendant, occurred on May 15, 1910, on Madison street and Central Park avenue, in the City of Chicago, while the plaintiff was alighting from one of the defendant's Halsted-Madison through-route cars. The plaintiff became a passenger on one of the Evanston avenue cars of the defendant. She paid her fare to the conductor of this car and received from him a transfer for the Halsted-Madison through-route car. When she got on the latter car, she gave this transfer to the conductor. Certain further facts, necessary to an understanding of this case, will be hereafter stated in this opinion.

The defendant concedes that the plaintiff was a passenger on the Evanston avenue car, but it insists that she was a trespasser on the Halsted-Madison through-route car. Conceding the

correctness of the legal proposition advanced by the defendant that it was incumbent upon the plaintiff to prove that she was a passenger upon the latter car, we are satisfied that the proof amply supports the allegation in the declaration that the plaintiff was a passenger on the Halsted-Madison through-route car at the time of the accident. The plaintiff testified that she paid her fare on the Evanston avenue car, and that she received from the conductor of that car a transfer for the Halsted-Madison through-route car; that when she got on the last mentioned car she handed the said transfer to the conductor, who accepted it, at that time, without protest, and permitted her to enter the car, and to take her seat, and to ride as a passenger to her destination, a distance of a number of miles; that when she reached her destination, (the place of the accident) the car was stopped by the conductor on a signal given by her, to enable her to alight. These facts are amply sufficient, in our judgment, to make out a prima facie case for the plaintiff, as to the allegation in the declaration that the plaintiff was a passenger on the car at the time of the accident.

The defendant insists that the proof shows that the transfer was "several hours late" and that it called for a ride in the opposite direction from that in which the said Halsted-Madison car was going; that therefore the said transfer was not a valid one, and the plaintiff was a trespasser upon the Halsted-Madison through-route car. It is not necessary for us to determine whether, under all the circumstances in this case, such a ticket as the defendant claims the one in question was, would make the plaintiff a trespasser on the Halsted-Madison car, for the reason that there is no evidence in the record tending to show that the transfer was "several hours late" and that it called for a ride in an opposite direction. On this subject, the conductor

on the Halsted-Madison car, an extra man, testified that after the plaintiff had been accepted as a passenger on the car, he went into the car and told the plaintiff that the "transfer was several hours late" and that it called for a ride in the opposite direction. He further testified that he kept the transfer and "put it with the rest of the transfers after I had this talk with her, and that evening I turned it in to the receiver of the company." It is quite apparent that the evidence of the conductor does not tend to prove that there was, in fact, anything the matter with the transfer. It appears that the conductor was an extra man and that after his talk with the plaintiff he allowed her to remain on the car and he treated her as a passenger. He kept the transfer and turned it in to the company in the regular way. A very reasonable inference to be drawn from his entire testimony and conduct is, that after his talk with the plaintiff, he again examined the transfer and found that it was not what he had supposed it to be. Is it likely that an "extra" conductor, working for a regular run and with a full knowledge of the positive instructions given by the company to the conductors (as shown by the proof) in the matter of the cars they should exercise in receiving transfers, would knowingly receive and turn in to the company such a transfer as the defendant now claims the one in question was? The conductor testified that on the day of the accident, he made a report of the accident to the railroad company, and at the same time, he turned over all his transfers to it; yet, the defendant did not produce the transfer in question on the trial, nor did it explain in any way its failure to do so. Nor did it offer any evidence tending to sustain its present claim as to the transfer. From all the facts and circumstances in the case, it is clear to us that the present contention of the defendant is without the slightest merit.

The defendant next contends that the plaintiff did not present her transfer to the conductor on the Halsted-Madison car at the transfer point; that her transfer was not valid at the place where she boarded the car, and that therefore she was a trespasser upon the car, and that the only duty that the defendant owed to her was not to wilfully or wantonly injure her, and that as the plaintiff's amended declaration alleged negligence only, the plaintiff cannot recover in this case.

Before passing upon this contention, we deem it advisable to state the facts of the case as we find them. We find from the evidence that the plaintiff became a passenger on the Evanston avenue car of the defendant company; that she paid her fare to the conductor of that car; that she asked for and received from this conductor a transfer that entitled her to ride on a Halsted-Madison through-route car that ran south on Halsted street to Madison street, and thence west on Madison to the place of the accident; that as the Evanston avenue car approached the intersection of Barry avenue, Clark street and Halsted street, where the Evanston avenue car meets the Halsted-Madison car, she pushed one of the electric buttons on the side of the car as a signal to the conductor that she desired to alight from the car at the said intersection; that the car did not stop at the said intersection, but it proceeded south on Clark street one block, until it came to the next intersection, Wellington street, where it was stopped at the request of the plaintiff, to allow her to alight; that just before the plaintiff alighted she complained to the conductor that he had failed to stop the car on her signal, and that he told her that he had signaled the motorman to stop the car at the intersection of Clark street, Halsted street and Barry avenue, but that the motorman had failed to observe his signal. We find further that

Wellington street runs east and west, and that it is a short block from the intersection of Wellington and Clark streets to Halsted and Wellington streets; that the plaintiff, for the purpose of taking the Halsted-Madison car, immediately walked west on Wellington one block to Halsted street, and took the Halsted-Madison through-route car, either at that corner (as she says), or in the middle of the block on Halsted street, between Barry avenue and Wellington street (as testified to by the motorman and conductor of the car); that the car was standing still when she boarded it; that the plaintiff presented to the conductor of the Halsted-Madison car the transfer she had received from the conductor on the Evanston avenue car; that the conductor accepted the same without the slightest objection, and permitted the plaintiff to take a seat in the car; that after the car had proceeded southwards about three-quarters of a block, the conductor walked into the car and told the plaintiff that the transfer was for a ride in the opposite direction, and that it was "several hours late;" that she would have to either give him a nickel, or get off the car; that she told him that she would not get off the car; that the conductor at no time said anything to the plaintiff about the place where she got on the car; that the conductor allowed the plaintiff to remain in the car without any further protest; that he placed the transfer that he received from her with the rest of the transfers that he received from other passengers; that he turned in all the transfers to the company that evening; that the plaintiff remained in the car and traveled a number of miles thereon, until she reached her destination at Madison street and Central Park avenue, when she signaled to the conductor to stop the car, and he did so; that the accident to the plaintiff occurred when she was alighting from the car at this point.

We further find that Barry avenue was the northern terminus of the Halsted-Madison line; that Halsted street runs north and south, and Barry avenue east and west; that Clark street, at the intersection of Barry avenue and Halsted street, runs in a northwesterly and southeasterly direction; that Barry avenue, at this intersection, has a jog in it; the part that is east of Halsted street being some feet further to the south than the part of it that is west of Halsted street; that the southwest corner of Halsted street and Barry avenue is some feet further to the north than the southeast corner of Halsted and Barry avenue; that the intersection of Clark street, Barry avenue and Halsted street makes an unusually large crossing; that the defendant company, for the purpose of receiving passengers, stopped its Halsted-Madison cars on the north and south sides of Barry avenue; that it does not appear from the evidence that it always stopped the cars at exactly the same points.

In support of its contention that the plaintiff was a trespasser, the defendant has cited numerous cases. None of these, in facts and in the nature of the action, is similar to the case at bar. We are satisfied that the plaintiff, under the facts of this case, was a passenger - not a trespasser - on the Halsted-Madison car.

The defendant next contends that the verdict is against the weight of the evidence. We have carefully considered this contention, and we cannot say that the verdict is manifestly against the weight of the evidence.

The defendant next contends that the damages are excessive. The jury rendered a verdict of $6,000, and the trial court required a remittitur of $2,000. After a careful examination of the evidence bearing upon the question of

damages, we find that we cannot say that $4,000 is an excessive amount to allow the plaintiff for the damages sustained by her.

The defendant next contends that the court erred in refusing to strike out certain evidence. Dr. H. Edward Bauer, who had treated the plaintiff, was called as a witness on her behalf. He was interrogated by the attorneys for the plaintiff as to the physical conditions he found, and he was called upon to give his diagnosis of the case. In the course of his examination and after he had stated in detail the physical conditions of the plaintiff, as he found them, the following occurred:

"Q. Doctor, what would be your prognosis in such a case?

A. Well, I should say that a case like that would perhaps remain more or less of a nervous irritant all the rest of her life. Of course, they have periods in which they get better, and then periods again in which they get worse.

Q. What is your opinion as to the permanency or curability of the conditions, after they have existed for a period of two and a half years?

MR. RYAN: Hasn't he just answered that? I object to that repetition of it, if your Honor please.

THE COURT: He may answer.

MR. O'BRIEN: Q. Tell us as to the permanency or curability.

A. I should say it is more or less permanent.

MR. RYAN: I move to strike out the answer, on the ground that it is indefinite, if the Court please, conjectural and speculative.

THE COURT: It may stand.

MR. RYAN: Exception."

It will be noticed from the foregoing that there was no objection to the original question, nor was there any motion made to strike out the answer to the same. The counsel for the defendant was apparently satisfied with the answer. We are unable to see how the answer to the last question differs in effect and meaning from

the answer to the first question. The courts have repeatedly held that where testimony is admitted without objection, and no motion is made to strike it out, the defendant cannot afterwards complain if the court admits similar testimony. Chicago Title & Trust Co. v. Sagola Lumber Co., 148 Ill. App. 337, 338, Affirmed 242 Ill. 468; People v. Hall, 242 Ill. 284, 294; Powers v. C. B. & Q. Ry. Co., 142 Ill. App. 515, 524; Tennyson v. Illinois Steel Co., 188 Ill. App., 95, 112, (certiorari denied in this case). In support of its contention that the answer to the last question should have been stricken out as indefinite, conjectural and speculative, counsel for the defendant cite the following decisions of our Supreme Court: Amann v. Chicago Consolidated Traction Co., 243 Ill. 264, 287; Lyons v. Chicago City Ry. Co., 258 Ill. 75, 81; Lauth v. Chicago Union Traction Co., 244 Ill. 244, 251. In each of these cases, witnesses were allowed to give conjectural and speculative answers as to possible future physical consequences that might result from the injuries in question. In the present case, the doctor had testified that certain physical conditions were present in the plaintiff. The answer complained of contained only the opinion of the doctor as to the permanency or curability of physical conditions that he had testified existed in the plaintiff. The Supreme Court of this State has never ruled that this may not be done. A physician or surgeon is permitted to state a judgment as to whether present conditions are apt to be permanent and, if any improvement seems probable, what are the chances for a complete recovery. In many cases, a conscientious expert would not care to give any more definite opinion. Not to allow such an answer as the one complained of in this case to stand, would, in our opinion, tend to encourage perjury on the part of medical men. We find no merit in this last contention of the defendant.

We have considered with care all the various errors assigned by the defendant in this case, and we are satisfied that there is no merit in any of them. In our opinion, the defendant has had a fair trial, and the judgment of the Superior Court will be affirmed.

AFFIRMED.

March 1914

94 - 20010

1174

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES BOSICKAVICH,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 462

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged with an assault with a dangerous weapon without any considerable provocation and under circumstances showing an abandoned and malignant heart with an intent to inflict bodily injury. The verdict found the defendant guilty of an "assault with a deadly weapon." Judgment was pronounced upon the verdict and a fine of $100 and the costs of the suit imposed.

It is contended that the verdict is insufficient to support the judgment in that it does not respond to the issues submitted to the jury. The judgment was one that could be rendered for a mere assault, and the court properly rejected as surplusage the words "with a deadly weapon," and rendered judgment for that offense on such verdict. An assault is an offense of a lesser degree than that charged in the information and is embraced in the terms thereof. In such a case a jury may acquit of the higher offense and convict of the lesser, even though there be no count specifically charging the lesser offense. (Kennedy et al. v. People, 132 Ill. 649; Wharton on Criminal Pleading and Practice (8th Ed.), Secs. 246-247.) The words rejected as surplusage neither added to nor detracted from the force of the verdict, which in effect was one for mere assault, authorizing the judgment entered, which will be affirmed.

AFFIRMED.

COURT OF THE CITY OF ILLINOIS,
Defendant in Error.

Error to
Municipal Court
of Chicago.

CHARLES BOTSCHEVICH,
Plaintiff in Error.

MR. PRESIDING JUSTICE DARLING delivered the opinion of the court.

Plaintiff in error was charged with an assault with a deadly weapon upon the person of [illegible]. Pleading not guilty he was tried in the Municipal Court of Chicago, sitting without a jury, and found guilty as charged in the complaint. The evidence for the People tended to show that on the evening of [illegible] he entered the saloon of [illegible] and ordered a drink. He was served, but when he attempted to pay for it he was told that the bartender was not allowed to accept money from customers. Thereupon he drew a revolver and pointed it at the bartender, who ran out of the saloon and called a police officer. [illegible] testified that he saw the defendant point a revolver at the bartender and heard him say, "I will fix you." The defendant was arrested and the revolver found in his possession. The defendant testified that he had been employed by the Illinois Steel Company for a number of years, and that he had a permit to carry the revolver. He denied that he had pointed it at the bartender, and testified that the bartender had refused to serve him a drink because he was drunk. The jury found the defendant guilty and fixed his punishment at a fine of $100 and imprisonment in the county jail for six months. Motions for a new trial, in arrest of judgment and for a writ of habeas corpus were overruled, and the defendant was sentenced in accordance with the verdict. He sued out this writ of error and asks that the judgment be reversed.

It is contended that the verdict is insufficient to support the judgment in that it does not find the value of the revolver upon which the charge of assault with a deadly weapon is based. Section 299 of the Criminal Code (Cahill's Rev. Stat. 1913, p. 940; Thurston on Pleading and Practice (2d Ed.), Sec. 340-342.) The cases referred to by counsel for plaintiff in error, People v. Hall, 48 Ill. 486; People v. Turman, 187 Ill. 346; People v. Graham, 71 Ill. 146; People v. Lewis, 124 Ill. 83

March 1914

95 - 20011

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MIKE BOSICKAVICH,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 464

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Only one point is raised in this record, which is the same as that raised in Case 20010, People of the State of Illinois v. Charles Bosickavich. The information in each case was for the same offense, and the form of the verdict alike in each. For the reasons stated in the opinion rendered in said Case 20010, there was no error in the entry of the judgment, which will be affirmed.

AFFIRMED.

STATE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

MYER BODINE et al.,

Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1871 A. 464

MR. JUSTICE CARTER delivered the opinion of the court.

Only one point is raised in this record, which is the same as that raised in Case 20613, People v. The State of Illinois v. Chester Overstreet. The information in each case was for the same offense, and the form of the verdict alike in each. For the reasons stated in the opinion rendered in said Case 20613, there was error in the entry of the judgment, which will be affirmed.

AFFIRMED.

2 A. 1913

1176

366 - 19380

ALBERT QUANN,
Appellee,

vs.

HENRY A. BLAIR and JOHN M. ROACH, as Receivers of the Chicago Railways Company,
Appellants.

Appeal from Superior Court, Cook County.

187 I.A. 465

Statement of the case. This is an appeal from a judgment for $6,000, rendered by the Superior Court of Cook County upon the verdict of a jury, in favor of Albert Quann, plaintiff, in an action for damages for personal injuries.

Quann was employed as a conductor by defendants, who, as receivers, were operating a street railway in the city of Chicago. On September 22, 1910, about 12 o'clock, noon, Quann reported at the car barns for work, and he and a motorman, named Daniel Ahern, relieved the crew on car No. 4368, at 12th street and 40th avenue, six blocks east of the west end of the run. While going west on 12th street to 48th avenue the car was run on the north track. To go east, downtown, it was necessary to switch the car from the north to the south track. The west end of the switch, or cross-over, was on the north track and the east end on the south track, and the car was run past the west end of the cross-over and close to another car standing on said north track. It was Quann's duty when the car came to a stop on said north track to prepare the car for its trip east. He opened the door on the south side of the car, closed the door on the north side, put up the step on the north side and put down the step on the south side, let down the fender at the east end of the car, pulled down the trolley pole and took it around the side of the car to the west end. He noticed that because of the close proximity of the other car there was not much room to raise and fasten the west fender of his car, and he so

Jan - Jones

informed Ahern, the motorman, who was standing in his regular position on the west platform, and also told Ahern that he had better back up a little. Quann then stepped in between the cars and put the trolley on the wire, standing at the time "in the middle on fender." Ahern, instead of backing the car towards the east and because of his failure to properly use the reverse handle, caused the car to move to the west and collide with said other car, and Quann's "left leg between the knee and ankle was caught between the two bumpers" and he was severely and permanently injured. Rule 41, contained in the Rule Book of the Company, was received in evidence and is as follows: "Backing car. Under no circumstances must car be run backward except for the purpose of avoiding an accident, without first reversing trolley, and trainmen being in proper positions on the car."

Plaintiff's declaration consisted of three counts, to which the defendants filed a plea of the general issue. The gist of the first two counts was that the defendants negligently permitted the brake on the west end of the car to become and be out of order. The first count alleged in substance that the car in question having been run to a point west of the cross-over on 13th street near 46th avenue it became necessary to switch the car from the north track, on which it was standing, over the cross-over and onto the south track, preparatory to running the car east; that it became necessary for plaintiff, the conductor in charge of the car, to change the trolley pole from the position it occupied while the car was going west to the other end of the car, to-wit, the west end; that after so changing the trolley pole it became necessary for plaintiff to put up the fender on the west end of said car, but that another car standing to the west of plaintiff's car prevented him from so putting up the fender; that plaintiff then directed Ahern, the motorman, to back up his car, but that Ahern inadvertently turned his lever the wrong way and thereby started his car

forward toward the other car instead of backward; that plaintiff was standing in his proper position, preparatory to raising said fender, and in a position where he might do so when it was sufficiently moved away from the other car that was standing there, and that plaintiff was then and there in the exercise of ordinary care for his own safety; that the defendants "negligently permitted the brake on said car," being so operated by said Ahern, "to become and be out of order, repair and condition, so that the same would not work properly and would not brake said car so as to stop the same properly in an emergency"; that when said Ahern saw that he had inadvertently started his car forward instead of backward he immediately applied his brake, but that by reason of said brake being out of repair, etc., he could not stop said car, and plaintiff was caught between the two cars, and greatly injured, etc. The allegations of the second count are substantially the same as in the first count, except that in the second count it is charged that the defendants negligently permitted said brake to become and to be out of order, etc., "in that the lower end of the brake rod, the same being the rod connected with the brake handle and being the part of said brake rod around which the chain winds that brakes the car, was covered with large chunks or parcels of grease, dirt and gravel, so that when the brake rod was moved and the chain wound up thereon the same slipped and thereby released the brake and prevented the same from catching and stopping the car, and would not brake said car so as to stop the same properly in an emergency." In neither of these counts is it specifically alleged that plaintiff did not know, or in the exercise of ordinary care could not have known, that the brake in question was out of order; and in neither of said counts is there any specific allegation that the defendants knew, or in the exercise of ordinary care should have known, that said brake was out of order, repair or condition.

The third count alleged that said Ahern "was not a reasonably competent, skillful, duly qualified motorman, and was not sufficiently skillful and experienced as such to properly run and operate said street car with reasonable safety to plaintiff and to others who might be associated with him" - all of which defendants knew, or in the exercise of ordinary care on their part could and should have known. The count then set forth the situation of the car and plaintiff's direction to Ahern to back the car, as in counts 1 and 2. The count then alleged that, as plaintiff was standing at the proper place for the purpose of raising and fastening the fender and was in the exercise of ordinary care for his own safety, Ahern, the motorman, "by reason of his incompetency, unskillfulness and lack of experience, started said car forward and in a westerly direction instead of starting it backwards and in an easterly direction, and thereby moved said car west on to this plaintiff and against the other car that was standing there, thereby then and there crushing this plaintiff between the two cars." It is not alleged in this count that plaintiff did not know, or in the exercise of ordinary care could not have known, of Ahern's alleged incompetency.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Four grounds for a reversal of the judgment are urged by counsel for defendants. It is contended (a) that a recovery on the theory that defendants negligently permitted the brake to be out of order is not warranted because the manifest weight of the evidence establishes that defendants were not negligent in that behalf; (b) that a recovery on the theory of the incompetency of the motorman, Ahern, is not warranted under the manifest weight of the evidence; (c) that the trial court made improper rulings on evidence, and (d) that the court erred in giving to the jury instructions Nos. 1, 2 and 3 offered by plaintiff. Inasmuch as we have reached the conclusion that the judgment should be reversed and a new trial

had on account of the giving of said instructions, we deem it unnecessary to discuss or express any opinion on the above first three points made by counsel.

By instruction No. 1 the court told the jury that "if you believe * * that the plaintiff has made out and proved the allegations of his declaration, or of any one or more of the counts therein, by a preponderance of the evidence in the case, then he is entitled to recover and you should find a verdict in his favor." Instruction No. 2 told the jury that "if you believe from all the evidence * * that the plaintiff has so made out his case as charged in his declaration or some count thereof, and that the evidence in the case preponderates in his favor, although but slightly, you may find the defendant guilty." Instruction No. 3 informed the jury that if "you are able to say that the plaintiff has proved his case as charged in the declaration or some count thereof by a preponderance of the evidence, then the jury should find the defendant guilty." It will be noticed that each of these instructions directs a verdict. As mentioned in the above statement of the case, in neither of the first two counts of plaintiff's declaration is it specifically alleged that plaintiff did not know, or in the exercise of ordinary care could not have known, that the brake in question was out of order, and in neither of said counts is it specifically alleged that the defendants knew, or in the exercise of ordinary care should have known, that said brake was out of order. In order to recover on either of these counts it was necessary for plaintiff to establish three propositions, viz: that the brake was out of order, that the defendants had knowledge thereof or ought to have had, and that plaintiff did not know of the defect and was not chargeable with knowledge of it. (The Sargent Co. v. Baublis, 215 Ill. 428, 433; Goldie v. Werner, 181 Ill. 551.) Under said instructions the jury might have thought that they were warranted in finding a verdict for plaintiff if they believed from

the evidence, which was very conflicting, that said brake was out of order, even though they at the same time believed either that the defendants did not have actual or constructive knowledge of the defect, or that plaintiff had or was chargeable with knowledge thereof.

As also mentioned in the above statement of the case, it is not alleged in the third count of plaintiff's declaration that plaintiff did not know, or in the exercise of ordinary care could not have known, of Ahern's alleged incompetency. As to the question whether or not Ahern was an incompetent motorman the evidence was conflicting, and there was evidence tending to show that if he was incompetent plaintiff either knew or should have known of it. In order to recover on the third count it was necessary for plaintiff to prove that he did not know, or in the exercise of ordinary care could not have known, that Ahern was an incompetent fellow-servant. (Klofski v. Railroad Supply Co., 235 Ill. 146, 157; McMahon v. Owsley, 260 Ill. 43.) Under said instructions the jury might have thought that they were warranted in finding for plaintiff if they believed from the evidence that Ahern was an incompetent motorman, even though they also believed from the evidence that plaintiff either knew or could have known of that incompetency.

We are of the opinion that in this case the giving to the jury of said instructions, Nos. 1, 2 and 3, constituted prejudicial error. (Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243, 245; Krieger v. Aurora, etc., R. Co., 242 Ill. 544, 548; Cantwell v. Harding, 249 Ill. 354, 358; Illinois Central R. Co. v. Smith, 208 Ill. 608; Lake Street Elevated R. Co. v. Fitzgerald, 136 Ill. App. 281, 284; Cromer v. Borders Coal Co., 246 Ill. 451, 454.)

Counsel for plaintiff contend that the allegation contained in each of the first two counts that plaintiff was in the

exercise of ordinary care for his own safety, coupled with the other allegations in each of said counts, is in effect an allegation that plaintiff did not know the brake was defective, and hence the jury were not misled by the giving of said instructions. We cannot agree with the contention. (Sargent Co. v. Baublis, 215 Ill. 428, 433.) Counsel also contend that if plaintiff knew of the alleged defect in the brake it was incumbent on the defendants to show that fact, that there is no evidence in the case that shows that plaintiff knew or could have known of the condition of the brake, and hence the jury were not misled by the giving of said instructions. Again, we cannot agree. We think it was incumbent on the plaintiff to prove that he did not know or could not have known of the defect (Chicago, etc., R. Co. v. Heeney, 303 Ill. 492; Swift Company v. Gaylord, 230 Ill. 330, 338); and we cannot say that there was an entire absence of evidence tending to show that plaintiff could have known of the condition of the brake. Counsel further contend that the allegation contained in each of the first two counts that the defendants "negligently permitted" the brake on said car to become and be out of order, etc., is equivalent to an allegation that the defendants knew of the condition of the brake, and hence the jury were not misled by the giving of said instructions. We cannot agree with this contention. (Sargent Co. v. Baublis, 215 Ill. 428, 433.) In the present case the defendants were not charged with the negligent construction of the brake, but with "negligently permitting" the same "to become and be out of order, repair and condition."

The judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Oct - 1913

216 - 19606

1177

In the matter of the petition of Victor I. Englert, arrested at the suit of Henry Kore.

On Appeal of VICTOR I. ENGLERT, Appellant,

vs.

HENRY KORE, Appellee.

Appeal from County Court, Cook County.

187 I.A. 467

Statement of the case. On June 9, 1913, Victor I. Englert filed in the County Court of Cook County a petition for his release from arrest and imprisonment under the Insolvent Debtors' Act. In the petition he alleged that he had been arrested under a writ of Ca. Sa. issued by the Clerk of the Circuit Court in favor of Henry Kore for the sum of $5,000, and that he was in the custody of the sheriff of Cook County by virtue of said writ. On the same day a hearing was had in the County Court on said petition and the court entered an order of record, in which the court found that "malice was and is the gist of the action in which judgment was heretofore rendered against said petitioner," and ordered that Englert be remanded to the custody of the sheriff. Englert thereupon prayed an appeal to this court, which appeal was allowed upon his filing a bond in the sum of $5,500 with surety to be approved by the court. Englert thereupon presented such bond, which was approved and filed, and he was released from arrest pending the appeal. On the following day Kore again appeared in the County Court and moved that the order allowing said appeal be vacated. On June 18th, upon a hearing of said motion, the same was denied. Englert seeks by this appeal to reverse the judgment of the County Court remanding him to the custody of the sheriff.

From the bill of exceptions before us it appears that on June 9, 1913, the said petition came on for hearing before the Honorable John F. Owens, Judge of said County Court; that petitioner and respondent were represented by counsel; that respondent moved that the petition be dismissed; that in support of the motion respondent introduced in evidence the declaration filed March 31, 1913, in said Circuit Court in the cause of Kore v. Englert, No. 320,172, and also introduced a certified copy of an order of said Circuit Court, entered in said cause on June 7, 1913; and that the County Court sustained said motion, dismissed the petition and remanded Englert to the custody of the sheriff, to which ruling Englert excepted. The bill of exceptions does not state that the above was all the evidence introduced on the hearing of the petition, and the bill of exceptions does not disclose that petitioner either introduced or offered to introduce any evidence showing or tending to show that malice was not the gist of the action. The declaration referred to consisted of two counts and disclosed that the action in the Circuit Court was "trespass on the case." The first count charged, in substance, that the defendant, Englert, "contriving and wickedly intending to injure plaintiff" and deprive him of the society and assistance of his wife (naming her), on, etc., at, etc., "wrongfully and wickedly debauched and carnally knew" said wife, whereby the affection of said wife for plaintiff was alienated and destroyed, etc. The second count charged, in substance, that said defendant "wilfully, wrongfully and deliberately set about to and did alienate the affection" of said wife for plaintiff, and thereafter, at, etc., "wrongfully and wickedly debauched and carnally knew" said wife, and thereafter, on, etc., induced said wife, secretly and wrongfully and without cause, to abandon and leave plaintiff and cohabit with defendant, and thereby the affection of said wife for plaintiff was alienated and destroyed, and plaintiff was deprived of the society and assistance of said wife

and his home was broken up, etc. The certified copy of the order of the Circuit Court referred to, set forth that on June 7, 1913, the plaintiff in said action of Kern v. Englert moved the court to issue an execution against the body of the defendant, Englert, and that it appearing from the record and files in said action that "the same is in tort and that the gist of said action was malicious, wicked and willful," as appear from the allegations of the declaration, and it further appearing that on May 29, 1913, "a judgment and finding was entered of record against the defendant for $5,000," under a stipulation of the parties to waive a trial by jury, "it is ordered that a writ of Capias ad Satisfaciendum issue against the person and body of the said Victor I. Englert."

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

When malice is the gist of the action, an insolvent debtor is not entitled to his discharge under the provisions of the "Act concerning Insolvent Debtors." (People v. Greer, 43 Ill. 313; Jernberg v. Mix, 199 Ill. 354, 356; Lasher v. Carey, 189 Ill. App. 147, 153.) The gist of an action is the essential ground or principal subject matter, without which the action could not be maintained. (Jernberg v. Mix, supra.) "The term 'malice,' as used in the act in question, applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another." (Jernberg v. Mix, supra; First National Bank v. Burkett, 101 Ill. 301, 304.) "The term 'malice,' as used in the statute under consideration, is not to be considered in the sense of hatred or ill-will, but of malus animus, and as denoting that the party is actuated by improper or dishonest motives." (Kitson v. Farwell, 132 Ill. 327, 338.) Whether malice is the gist of a civil action is to be determined from an inspection of the record in that action (Biebel v. Kuttnauer, 147 Ill. App. 627, 629; Lasher

v. Carey, supra), and particularly from the allegations of the declaration. (People v. Healy, 138 Ill. 9, 14; Pangyer v. People, 108 Ill. App. 481, 483.)

In view of the above authorities and considering the evidence introduced before the County Court, as above outlined in the statement of the case, we are of the opinion that it sufficiently appeared that malice was the gist of the action in the Circuit Court, and that the County Court did not err in remanding Englert to the custody of the sheriff.

The point is made that no copy of the judgment of the Circuit Court was introduced in evidence on the hearing in the County Court,- merely a copy of an order directing the issuance of the ca. sa., based upon a judgment recited in the order. It is a sufficient answer, if one be needed, to say that it does not appear from the bill of exceptions that said copy of the order and the declaration were all the evidence introduced before the County Court.

The judgment is affirmed.

AFFIRMED.

Oct. 1913

333 - 19732

ALONZO M. GRIFFEN and ZENO T. GRIFFEN, co-partners, doing business as GRIFFEN BROTHERS,

Plaintiffs in Error,

vs.

CITY OF CHICAGO HEIGHTS,

Defendant in Error.

Error to County Court, Cook County.

187 I.A. 468

Statement of the case. The plaintiffs, Griffen Brothers, whose business was that of shorthand reporting, brought suit in assumpsit in the County Court of Cook County against the City of Chicago Heights to recover for certain shorthand work done and for $5.60 expended for railroad fare, amounting in all to $115.10. By agreement a trial by jury was waived and the case was heard by the court upon a stipulation of facts, and the oral testimony of one witness, resulting in a finding of the issues for the defendant, City of Chicago Heights, upon which finding a judgment was entered against the plaintiffs for costs. This writ of error is prosecuted to reverse the judgment.

From the stipulation of facts the following appears: On May 8, 1912, J. C. K. Lindhout, then corporation counsel of the City, telephoned plaintiffs at their office in Chicago, requesting them to send a shorthand reporter to Chicago Heights on that evening to do some shorthand work for said City. Thereupon plaintiffs sent one Sebastian, a shorthand writer associated with them, to do said work and represent them as their agent. On that evening at Chicago Heights Sebastian met said Lindhout, corporation counsel, together with several alderman of the City, including H. M. Scott, a member of the finance committee of the city council. Both Lindhout and Scott informed Sebastian that the services of a reporter were required in reporting the proceedings of a meeting of the council that evening, as well as reporting other meetings of the

council and committees thereof on subsequent dates, "in regard to a controversy then pending between the mayor of said City on the one hand, and certain of the aldermen and the corporation counsel on the other, relative to certain public improvements in said City, and that bills for said services should be rendered to and would be paid by the City." Before entering the council chamber that evening Sebastian met the mayor of said City, W. H. Stolte, and he was asked by the mayor if he was employed to report the proceedings of the council, and, he replying that he was so employed, was told by the mayor that he had better be sure how he was going to be paid before proceeding. Sebastian reported the proceedings of said meeting of the council on May 9th, and either he or another agent of plaintiffs, upon notification by said corporation counsel, also reported the proceedings of meetings of the council on May 13th, May 20th and May 31st, and also reported the proceedings of two meetings, held May 25th and 28th in a hall on the same floor where the corporation counsel's office was located, "of a certain committee or board of arbitration which volunteered its services toward a settlement of the controversy then existing between the mayor and three of the aldermen on the one hand, and eleven of the aldermen and the corporation counsel on the other hand; at which meetings * * were present the mayor and certain of the aldermen and said Lindhout, and also, by direction of some aldermen and said Lindhout, a stenographer from the office of Griffen Brothers; * * the matters submitted to said board of arbitration were not claims against the City, nor matters in which the City was a party, but were differences between the mayor and certain aldermen on one hand, and the majority of the aldermen and the corporation counsel on the other hand, relating to the abolishment and reorganization of the board of local improvements." No formal action was at any time taken by the city council in meeting assembled authorizing the employment of plaintiffs, or any other

stenographers, to report the proceedings of the city council or any committee thereof, or bearing upon such employment, until the action of June 17, 1912, hereinafter mentioned. Either Sebastian or another agent of plaintiffs transcribed the proceedings of said meetings, and the transcript was delivered by plaintiffs either to said Lindhout or some of the aldermen of said City and is now in the possession of said alderman, H. M. Scott. On June 3, 1912, plaintiffs rendered their itemized bill to said City, showing the total amount due them as $115.10. This bill was headed "In re investigation as to abolishment of board of local improvements." It is agreed in said stipulation of facts that the rates charged in said bill are the usual and customary charges for such services in Cook County. Subsequent to the rendition of said bill the same was approved by the finance committee of the council, and at a regular meeting of the city council held on June 17, 1912, the same was, together with various other bills, duly allowed and its payment ordered by the council. Subsequently a warrant for its payment was drawn by the city clerk upon the proper funds of the city and presented to said mayor for his signature, but he refused to sign the same, has since refused and still does refuse so to do. The bill was not paid, and on August 27, 1912, plaintiffs commenced this suit. It is agreed in said stipulation of facts that "the total amount due on said bill is $115.10."

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for plaintiffs contends that the finding and judgment of the trial court were erroneous because (a) the corporation counsel of the City had power to incur the obligation on behalf of the City although he had not been specifically authorized by the city council so to do, and (b) even if the corporation counsel had not the power to incur said obligation the city council, by allowing plaintiffs' bill and ordering the same paid, ratified the act of the corporation counsel, and the City became obligated to pay said bill. Counsel for the City contends that the employment of plaintiffs to do said stenographic work was wholly ultra vires the City, notwithstanding said alleged ratification.

No point is made that plaintiffs did not do the work, or that the rates charged were not the usual and customary charges for such services. Indeed, it is stipulated that "the total amount due on said bill is $115.10." The sole question is whether or not the City is liable.

Counsel for the City, in support of his contention that the City is not liable cites the case of City of Chicago v. Williams, 183 Ill. 135. In that case Williams sued and recovered a judgment against the city for stenographic and typewriting work done under a contract with the chief of police and corporation counsel in a case wherein the chief of police was sued for false imprisonment, arising out of an arrest made in the course of his official duties. Our Supreme Court, in reversing the judgment, held that the city could not, under any circumstances, be held for damages for false imprisonment by reason of the wrongful conduct of the chief of police, that the city had no interest in the litigation wherein the stenographic services were rendered, that the contract employing the stenographer did not concern any corporate

purpose of the city, and that, hence, the city was not liable for the fees of the stenographer.

We do not think that the decision in the Williams case is applicable to the facts of the present case. In the Williams case the court in its opinion (p.141) said: "'Public corporations may, by their officers and properly authorized agents, make contracts the same as individuals and other corporations in matters that appertain to the corporation.' (1 Dillon on Corp.-4th ed.-sec. 445.) The matters, involved in the contract here in controversy, do not necessarily appertain to the municipality, or any of its interests." In the present case the stenographic work consisted in reporting the proceedings of certain meetings of the city council and of two meetings of a committee of arbitration, when there was pending a controversy between the mayor of the City and certain aldermen on the one hand, and a majority of the aldermen and the corporation counsel on the other hand, which controversy related "to the abolishment and reorganization of the board of local improvements." We think that the contract made with plaintiffs by the corporation counsel and subsequently ratified by the city council in the manner as above outlined, appertained to the municipality or its interests. The controversy was evidently a protracted and a heated one, and it was doubtless advisable that a record be preserved of the proceedings of the meetings.

In City of Chicago v. Berger, 100 Ill. App. 138, the corporation counsel of the city ordered and had made some photographs for use in the defense of certain actions then pending or about to be brought against the city, and it was held that the corporation counsel, by virtue of his office and in the performance of his duty to prepare defenses, had ample power to order the photographs and that the city was liable therefor. In 2 Dillon on Municipal Corporations, 5th edition, sec. 797, it is said: "A municipal corporation may ratify the unauthorized acts and con-

tracts of its agents or officers, which are within the scope of the corporate powers, but not otherwise." In Village of Harvey v. Wilson, 78 Ill. App. 544, 550 (quoting from Connett v. City of Chicago, 114 Ill. 233, 239), it is said: "No doctrine of the law is better settled than that where the contract entered into on behalf of a named principal is one which the principal himself might lawfully make, it may be so ratified, and thus given effect. Nor is it necessary such ratification should be express. It may, like most other facts in pais, be proved by circumstances." In Ward v. City of Du Quoin, 173 Ill. App. 515, it is held that a city council has power to employ expert accountants to examine the books and records of the city. In People v. Spring Lake District, 253 Ill. 479, 500, it is said: "Contracts entered into by a municipality which are prohibited by express provision of the law, or which under no circumstances could be legally entered into, are uniformly held to be ultra vires and void, and cannot be rendered valid, as against the municipality, by receipt of the consideration or other matter of estoppel, and cannot be rendered valid and binding by any act of the municipality ratifying the same. * * * There is another class of municipal contracts which are usually classed as ultra vires which are only so in a limited or secondary sense. These are contracts which are within the general powers of the corporation but which are void because the power was irregularly exercised, or where some portion of an entire contract exceeds the corporate powers but other portions of the contract are within the corporate powers. * * The principle is now firmly established that the doctrine of ultra vires is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honesty and fair

dealing. Contracts made by a municipality which are merely ultra vires in a modified or secondary sense may be ratified and any defect in the manner of exercising the power thereby cured and the municipality may likewise estop itself by acts in pais from setting up the defense of ultra vires."

Under the facts of the present case we have reached the conclusion that the judgment of the County Court should be reversed, and, the cause having been heard by the court without a jury and there being no controversy as to the amount of the bill of plaintiffs in error, viz., $115.10, judgment will be entered here in favor of plaintiffs in error and against defendant in error for that amount and the costs of plaintiffs in error in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

Ord. 193 (187)

294-19692

CATHERINE CRONIN,
Defendant in Error,

vs.

COURT OF HONOR,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

187 I.A. 480

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was begun in the Municipal Court of Chicago by Catherine Cronin against the Court of Honor. Defendant is a fraternal beneficiary society existing under the laws of the State of Illinois. The action was brought to recover $1,000, the amount claimed by the plaintiff to be due her from the defendant as beneficiary under a certificate of insurance issued to Cornelius Cronin, plaintiff's husband.

A judgment was recovered by the plaintiff for $1,000 and costs, and this writ of error is prosecuted to reverse the judgment.

On February 22, 1911, Cornelius Cronin made an application for membership and for insurance payable at his death in the Court of Honor to Catherine Cronin, his wife. On application a certificate for $1,000 insurance payable to Catherine Cronin, as beneficiary, was issued to Cornelius Cronin, a copy of the application being attached to and made a part of the certificate. The certificate was delivered to Cornelius Cronin March 13, 1911, who accepted same in writing upon its face and agreed to its conditions. The certificate provides that the application was accepted upon the faith of the warranties contained in the application, and the certificate also recites "that it is expressly agreed that the application, the constitution, laws and rules of Court of Honor, and this

certificate shall be the complete and only contract" between Cornelius Cronin, the Court of Honor or his beneficiary.

In the constitution, laws and rules of the Court of Honor it is provided that the Supreme Medical Examiner shall personally review all applications and recommend or reject applicants, and that applicants must answer any questions in applications satisfactorily.

Cornelius Cronin, the insured, died February 3, 1913. Written proofs of death were filed by the beneficiary, which were offered in evidence, the proofs of death showing that Dr. Daniel J. Lynch had been medical attendant or advisor of Cornelius Cronin for twelve years.

The evidence shows the death of Cornelius Cronin and that he was a member of the Court of Honor, and that he paid his dues. It also shows the constitution, laws and rules and the certificate issued by the Court of Honor, and a copy of the application, which is a part of the certificate. It appears also from the evidence that Cornelius Cronin, in his signed application, made the following statements and answers:

> "For the purposes of this application, I declare, answer and warrant as follows: 'I am now of sound body and mind, in good health and free from disease or injury. I agree to conform in all respects to the constitution, laws and rules of the Society, now in force or which may hereafter be adopted; and that this application, including therein the succeeding pages, and the law of the Society shall form the sole basis of my admission into and continued membership in the Court of Honor, and of the benefit certificate to be issued to me by said Court of Honor; that any untrue or fraudulent statement or answer made to the district medical examiner, or any concealment of facts, intentional or otherwise, in this application, or in the succeeding pages, or my being suspended or expelled or the voluntarily severing my connection with the Society shall forfeit the right of myself and that of my beneficiaries to any and all benefits and privileges therein or arising therefrom.'"

The evidence also shows that Cornelius Cronin, in his signed application, made the following statements and answers to the district medical examnier: "Petitioner's Statement to the District Medical Examiner. The following are true and correct

answers and statements to the following particulars concerning my family history: 3. Make full explanation of all points in family history out of the ordinary? None. 7. Do you waive all provisions of law forbidding any physician who attended you testifying to the facts? Yes. 10. Have any facts regarding your past health been omitted? NO. 14. Have you personally consulted a physician, been prescribed for or personally treated for sickness or accident in the past five years? No. 17. Have you had any serious illness, local disease or personal injury? No. 20. Have you applied for or received a pension? No."

The foregoing answers and others were followed by the following: "I hereby adopt as my own the foregoing answers and statements, whether written by me or not, and declare and warrant that they are full, complete and true, and I agree that the truth of each answer and statement mentioned above shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers, and that I have not concealed or omitted to state any facts regarding my health, either past or present."

"I further agree that the foregoing answers and statements, together with the preceding declaration shall form the basis of the contract between the Court of Honor and myself, and shall constitute warranties and are offered by me as a consideration for the contract applied for and are hereby made a part of any benefit certificate that may be issued upon this application, and shall be deemed and taken as part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as part of my contract; and I further agree that if any answer or statement in this application is not true and complete, or if I shall fail to comply with, and to conform to any or all of the laws of said Court of Honor, now in force or that may hereafter be enacted, amended or adopted, that my

benefit certificate shall be void."

On the trial, counsel for the plaintiff in error submitted to the jury several special questions for answers to be made thereto in their finding, to which the jury replied as follows: "We, the undersigned jurors, do hereby make special findings and answers to questions submitted as follows:

> 'Did Cornelius Cronin, within five years prior to signing application and statement to the District Medical Examiner, consult a physician, been prescribed for or professionally treated for sickness or accident. No.'
> 'Did Cornelius Cronin prior to signing application and statement to the District Medical Examiner have rheumatism? No.'
> 'Had Cornelius Cronin when he signed application and statement to the District Medical Examiner applied for or received a pension? No.'"

The plaintiff in error cannot complain that the special findings of the jury submitted by it were against the evidence or unwarranted, as the point was not made or raised in its motion for a new trial, and cannot, therefore, be availed of on appeal or writ of error. Such matters are waived, and we cannot consider them. (Avery v. Moore, 133 Ill. 74; Empire Machinery Co. v. Brady, 164 id. 58; Voight v. Anglo-American Provision Co., 202 id. 462; Wolfe v. Monarch Refrigerating Co., 252 id. 491.)

We may, however, consider the ruling on evidence. Error is assigned on the refusal of the court to allow certain questions to be answered by Dr. Lynch. The evidence shows that within five years before the application was made to plaintiff in error, Dr. Lynch attended him as a physician. Dr. Lynch was called by plaintiff in error, and testified that he was a practicing physician and surgeon in Chicago, and that he had known Cornelius Cronin for about twelve years; that he had made affidavit of death proofs furnished the defendant in error; he was asked, "Did you attend him (Cronin) that time or around that time at 2826 Calumet avenue? A. I attended him as a medical adviser, but he was not a sick man. I want to correct one

statement.

"Q. What was said by him? (Objection by plaintiff and sustained.)

The Court: The deceased is not here to deny it. I will sustain the objection. He may testify to what he did.

A. We had a conversation. I didn't do anything for him at that time. I didn't prescribe for him. Shall I state confidential conversation with him?

The Court: I will rule you may show what you did for him. He cannot state the conversation. (Exception by defendant.)

Q. When you were medical adviser of Cronin and called at his house what did you advise Cronin?

Mr. Murray: (Attorney for plaintiff) I object as immaterial, as too remote, and being a professional secret between the doctor and his patient.

The Court: That is a privilege the doctor may use. I will overrule the objection to the first two questions and the third I think is for the doctor to claim the privilege if he desires.

The Court: If you don't want to answer that question on account of a privileged communication you have a right to decline.

The Court: Mr. Cronin waived that privilege, but the doctor has the right to claim the privilege and not to answer this question.

Witness: I claim the privilege, your Honor. (Objection sustained.)

Mr. Sullivan: You claim the privilege?

A. I reserve that right, yes.

Q. What was the trouble with Cornelius Cronin at that time?

Mr. Murray: I object as incompetent, too remote, and also on the grounds of being a privileged question.

The Court: Do you claim the privilege on this question?

A. Yes.

The Court: Objection sustained and exception."

The witness further testified that several years before he was testifying he had attended Cronin personally in the capacity of medical adviser and that his prescription could be found in some pharmacy, about six years ago, and that Cronin at that time complained of pains in the back and he gave him the prescription.

The ruling of the court in allowing the physician to excuse himself from answering on the ground of privilege, is erroneous. At common law there was no privilege as to communications between the physician and patient, and this rule still prevails where it is not changed by statute. (40 Cyc. 2380-2381). Second, the rule is for the benefit of the patient where such privilege exists and not the physician, and the patient, as between himself and the plaintiff in error, waived it in his application, which was a part of the contract.

For this material substantial error in ruling on evidence, the judgment must be reversed and the cause remanded for a new trial. We do not deem it necessary to discuss the alleged errors in the instructions, if any, as they will probably not arise upon the second trial.

REVERSED AND REMANDED.

-2-

The Court: Do you think the relation on this case-

ring?

A. Yes.

The Court: Objection sustained [illegible].

The witness further testified that several years be-

fore he was carefully he had viewed Oracle previously to the

[illegible] of selling property and that prior to final

it would [illegible], about his price, and that Oracle at that time

conditions of value in the tract [illegible] the investigation.

the value of the object in viewing the physical co-

nditions [illegible] from obtaining the [illegible], is actu-

ally [illegible] by the [illegible] of [illegible], is actu-

ally [illegible] by the [illegible] of [illegible], is actu-

ally [illegible] by the [illegible] of

1913

361 - 19781

MARY SCHILLER, Appellee,
vs.
GEORGE W. NEVIUS, Appellant.

Appeal from County Court, Cook County.

187 I.A. 485

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the County Court of Cook County in an action in case brought by Mary Schiller, appellee, against George W. Nevius and Laird W. Nevius. No service was had on Laird W. Nevius.

The declaration is in three counts in all of which the defendants are charged with negligence in the practice of their profession as dentists. In each count the relation of the parties is alleged and the legal duty arising therefrom and the violation of that duty, resulting in injury to plaintiff, according to the approved forms given in Chitty's work on Pleadings. The action set forth in the declaration, and each count thereof, is in tort and not in contract.

The first question to be considered in this case is whether the County Court had jurisdiction to hear and determine the case. This question was called to the attention of the court before the trial was entered upon and was reserved for later consideration. At the close of the evidence the defendant moved the court to dismiss the case. This motion was overruled. The question was again raised on a motion for a new trial, and upon a motion in arrest of judgment.

County Courts in this state have jurisdiction at law under Section 35, Chap. 37, Hurd's Revised Statutes, which reads as follows:

"The county courts shall have concurrent jurisdiction with the circuit courts in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed one thousand dollars ($1,000.)"

The jurisdiction of a justice of the peace is prescribed by Chapter 79, Article 11, Hurd's Revised Statutes. The only portions of the statute which relate to jurisdiction in cases of this kind are in the first section, which reads as follows:

"In actions arising on contracts, whether under seal or not, expressed or implied, for the recovery of money only;"

and in the sixth section, which provides:

"In all cases where the action of debt or assumpsit will lie."

We find in these statutes no jurisdiction vested in the County Court to hear and determine actions in tort. (Nevin v. Pullman Palace Car Co., 106 Ill 233; City of Robinson v. Hilderbrand, 71 Ill. App. 53; Horne v. Mandelbaum, 13 id. 607.)

The judgment below is, therefore, reversed and the cause is remanded.

REVERSED AND REMANDED.

Oct. 1913

394 - 19795

JOSEPH T. MELLON, Appellant,
vs.
ALBERT E. HAGEN, Appellee.

Appeal from Circuit Court, Cook County.

187 I.A. 486

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The bill in this case is brought to rescind a contract of purchase of a one-half interest in a saloon business for fraud, and to dissolve a partnership between the complainant and defendant, and for an accounting, and to set aside a certain note and mortgage given by the complainant to the defendant in part payment for the one-half interest in the saloon business.

A general and special demurrer was sustained to the original bill and to four amended bills thereafter filed by leave of court. The demurrer was ordered to stand to the fourth amended bill which was dismissed for want of equity.

The complainant, Mellon, alleges in his bill that he made the acquaintance of the defendant, Hagen, through an advertisement appearing in the Daily News, published and circulated in the city of Chicago, Illinois; that the complainant called upon defendant to negotiate for the purchase of a saloon at 319 South La Salle street, Chicago, Illinois, and Hagen then and there stated to the complainant as follows: "I want a partner. The reason I want to get one is because I live in the country at Hinckley, Illinois, where I am now erecting a building in which I am going to conduct a saloon business with

my brother-in-law and I want to get a good, straight, honest fellow who will take a half interest in this place. I will take $2,250 cash for a half interest, which is about half what it is worth. The receipts of this saloon for the past year have never been less than $60 a day. The net profits at the present time and for a year last past exceed $30 a day after deducting the cost of goods, light, rent, help and incidental operating expenses."

The bill avers that in truth and in fact the receipts of the saloon for the past year had been about $40 a day, and the gross receipts at the time the above representations were made did not exceed the expenses of running the business; that the defendant Hagen well knew that said representations so made were false and fraudulent and were so made for the purpose of inducing the complainant to part with his money and property; that the complainant, relying upon said false and fraudulent representations, was induced to pay and did pay over to the defendant the sum of $2,250 as hereinafter stated; that the complainant made diligent inquiry to ascertain the truth of the situation from the defendant and relied upon his representations which proved to be false and fraudulent; that the complainant stated to Hagen at the time the negotiations were being carried on that he, the complainant, was a sea man and not familiar with the saloon business, nor any other business; that the complainant requested the said Hagen to show to him the account books showing that the business was taking in $60 a day and was making a profit of $30 a day, but that said Hagen informed complainant that he did not keep any books, that the cash register showed the amount of the daily receipts and that, after the day was over, the combination was re-set so as to be ready to register the amount to be taken in the following day; that the complainant then stated to defendant Hagen that if the business was making a profit of $30 a day it would be a good investment for the complainant, and that Hagen then and there stated it would certainly be a

profitable investment as the place could be made to take in $100 a day in receipts.

The complainant further alleges that, relying upon the statements and representations made to him by the defendant Hagen, he entered into and did form a copartnership with the said Hagen, the defendant, and Hagen did then and there, by a bill of sale, dated November 20, 1913, transfer, sell and assign to the complainant a one-half interest in said saloon business, and the bill then sets forth the bill of sale.

The complainant avers that he paid in cash a sum of $1,000 to the defendant Hagen, and signed, executed and delivered to Hagen his note and mortgage, bearing date November 20, 1913, for the sum of $1,250; that the note was payable to the order of said Hagen, due one year thereafter, with interest at the rate of six per cent. per annum, and was secured by a certain trust deed or mortgage on a farm owned by the complainant in the state of Michigan, and that the note and trust deed were still outstanding.

The complainant further avers that the business, since November 20, 1913, has not taken in in cash receipts or otherwise an average of $40 a day, and that during all the time that the complainant has been engaged in said business with the defendant Hagen, the complainant has been forced and compelled to advance and put into said business divers sums of money from his own private funds to protect the business and to prevent it from being closed up for want of funds to meet current bills and expenses; that the business has not at any time since November 20, 1913, been profitable but, on the contrary, has been operated by the complainant at a great loss.

The complainant further alleges that he has requested the return of the moneys and securities obtained by Hagen from him, and has offered to turn back to said Hagen the one-half interest in said business which he purchased, and that said Hagen has declined

to dissolve the partnership or to surrender or deliver up or cancel the note and mortgage above mentioned, and refuses to return to the complainant the $1,000 paid by the complainant to Hagen in part payment for the one-half interest in the business.

The bill then charges that the money and note and mortgage were obtained from complainant by fraud and circumvention for the purpose of cheating and defrauding him of the moneys without giving him any consideration whatever therefor, and that the said note and mortgage were likewise obtained by fraud and circumvention and should be delivered up and surrendered to the complainant and canceled, and that the partnership agreement should be declared void, and be delivered up and canceled and set aside.

The bill further alleges that the note and mortgage mentioned therein are still outstanding and that the mortgage has been duly recorded in the recorder's office in the county of Chippewa, in the state of Michigan, and, as appears from the record, is a valid and existing lien upon the complainant's farm.

The bill further represents that the defendant, Hagen, aside from the one-half interest in the business and exclusive of the trust deed and note for $1,250 which he falsely and fraudulently obtained from the complainant in the manner set forth in the bill, is totally insolvent and has no property or assets, personal or real, against which the complainant can secure restitution of his losses, and that the defendant has threatened to and is about to sell, assign or otherwise dispose of his one-half interest in the saloon business, stocks and merchandise, leasehold interest and saloon license of the premises known as 310 South La Salle street, and threatens to and is about to collect the outstanding debts due and owing to said saloon business, and is about to sell, assign or otherwise dispose of the trust deed and note for $1,250, and unless restrained and enjoined by the court from so doing, the complainant will be irrep-

arably and irremediably injured and prevented from securing his rights in the premises.

The bill prays for a decree for the return of the $1,000 cash paid by complainant to the defendant, and that the trust deed and note for $1,250 be decreed to be returned, delivered up and marked as canceled, and that the partnership agreement be declared null and void.

The bill sets up facts and circumstances which, if true, (as the demurrer admits) clearly show that the complainant was compelled to and did rely solely upon the statements and representations of defendant, Hagen, as to the amount of the actual receipts and disbursements of the business during the year preceding the negotiations between the parties. It appears that the complainant could not verify, by any means known to him, the statements made by the defendant. The statement of the defendant that he kept no books nor record of the amount of the receipts of the business and had no record thereof to show to the complainant, compelled the latter to rely wholly upon the statements of the defendant with reference to the business. In our opinion, the bill states good grounds for equitable relief to the complainant. O'Donnell & Duer Bavarian Brewing Co. v. Farrar, 62 Ill. App. 471; and on appeal, in Bavarian Brewing Co. v. Farrar, 163 Ill. 471, the Supreme Court, at page 475 of its opinion, after suggesting that some of the representations set up in the bill in that case amount to no more than expressions of opinion as to the value of the property and business or a recommendation of the property of the seller, says:

> "On the other hand, that the saloon business was doing a profitable business, mostly glass trade, and especially that the income was $20 per day, were statements of fact which, if false (as they were found to be by the court below) would entitle the complainants, upon discovery of the real facts, to a rescission of the contract. (Allin v. Millison, 72 Ill. 301; Hicks v. Stevens, 121 id. 186.)"

An additional abstract of record is filed in this

case, containing 49 pages , and setting up the original bill and the several amendments to the bill and the special demurrers to the bill and the several amendments, which we think were wholly unnecessary for the consideration of the case. The fourth amendment to the bill was sufficiently abstracted in the original abstract filed by appellant, and also the special demurrer ordered to stand to that amendment. The costs of the additional abstract, as well as all other costs on this appeal, will be taxed against appellee.

The court erred in sustaining the demurrer to the bill of complainant in this case, and the decree is, therefore, reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

5846

1186

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 504

R. H. Denied

May 21. 1914

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5846,

Henry O. Forrest
Appellee,
vs.
Roper Furniture Company,
Appellant.

Appeal from Lee.

Opinion by CARNES, J.

Henry O. Forrest, appellee, sued Roper Furniture Company, appellant, to recover for an injury to his right eye while in the employ of that company, claiming a violation of Section 1 of the Act of 1910 Hurd's Revised Statute, 1911, page 1138, which provides, "That all power driven machinery including all saws ..... shall be so located wherever possible as not to be dangerous to employes or shall be properly inclosed, fenced, or otherwise protected," and though stipulated to be under the Workmen's Compansation Act of 1912 he claims the right to maintain this action under the provisions of section 3 of that act, Hurd's Revised Statutes, page 1137, which provides, "That when the injury to the employe was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer."

There is a declaration of six counts which appellant says properly presents the claim, to which the general issue was filed. And plaintiff had verdict

Mr. Ellis,

Henry O. Torrest

Appellee,

vs. Appeal from Law.

Hoper Furniture Company,

Appellant.

Opinion by GARNER, J.

Henry O. Torrest, appellee, sued Hoper Furniture Company, appellant, to recover for an injury to his right eye while in the employ of that company, claiming a violation of Section 1 of the Act of 1910 Hurd's Revised Statute, 1911, page 1128, which provides, "That all power driven machinery including all cams ..... shall be so located wherever possible as not to be dangerous to employes or shall be properly inclosed, fenced, or otherwise protected," and though stipulated to be under the Workmen's Compensation Act of 1913 he claims the right to maintain this action under the provisions of Section 8 of that act, Hurd's Revised Statutes, page 1134, which provides, "That when the injury to the employe was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer." There is a declaration of six counts which appellant says properly presents the claim, to which the general issue was filed. And plaintiff had verdict

and judgment for $2500 from which the defendant appeals.

Allellee was in the employ of appellant Auguse 29th, 1912, operating a steam power driven rip saw, and while so doing a splinter was by the action of the saw, thrown into his right eye. At the time of the trial in May 1913 the eye was useless so far as sightis concerned and there was visible in it a scar and other conditions leaving no question about that fact. The eye had been injured about sixteen years before that time leaving a scar and some weakness . Appellant's contention, to which the greater part of its argument is directed, is that this loss of sight came from that old injury aggravated by some other irritating causes shown by the evidence, and not from the accident complained of here, and expert testimony was heard to the effect that the accident could not have produced the injury. But appellee testified that before the injury in suit here he could see to work and read with the other eye closed, that at one time a few months before the accident he had, while in the employ of appellant some temporary injury of the left eye and worked for two days with it covered, using only the right eye; and he is corroborated by other witnesses as to this fact; and it is proven by a physician called as a witness by appellant that on August 31st, two days after the accident, the eye was in so had a condition that its removal was advised by the doctor.

We are satisfied from the evidence that there was

No. 8145.

Henry O. Torrent

Appellee,

vs.

Hoyer Furniture Company,

Appellant.

Appeal from Lee.

Opinion by GARNER, J.

Henry O. Torrent, appellee, sued Hoyer Furniture Company, appellant, to recover for an injury to his right eye while in the employ of that company, claiming a violation of Section 1 of the Act of 1910 Hurd's Revised Statute, 1911, page 1128, which provides, "That all power driven machinery including all cams ..... shall be so located wherever possible as not to be dangerous to employes or shall be properly inclosed, fenced, or otherwise protected," and though stipulated to be under the Workmen's Compensation Act of 1913 he claims the right to maintain this action under the provisions of section 3 of that act, Hurd's Revised Statutes, page 1117, which provides, "That when the injury to the employe is caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer."

There is a declaration of six counts which applaint says properly presents the claim, to which the general issue was filed. And plaintiff had verdict

and judgment for $3500 from which the defendant appeals.

Allellee was in the employ of appellant Auguse 29th, 1912, operating a steam power driven rip saw, and while so doing a splinter was by the action of the saw, thrown into his right eye. At the time of the trial in May 1913 the eye was useless so far as sightis concerned and there was visible in it a scar and other conditions leaving no question about that fact. The eye had been injured about sixteen years before that time leaving a scar and some weakness . Appellant's contention, to which the greater part of its argument is directed, is that this loss of sight came from that old injury aggravated by some other irritating causes shown by the evidence, and not from the accident complained of here, and expert testimony was heard to the effect that the accident could not have produced the injury. But appellee testified that before the injury in suit here he could see to work and read with the other eye closed, that at one time a few months before the accident he had, while in the employ of appellant some temporary injury of the left eye and worked for two days with it covered, using only the right eye; and he is corroborated by other witnesses as to this fact; and it is provem by a physician called as a witness by appellant that on August 31st, two days after the accident, the eye was in so had a condition that its removal was advised by the doctor.

We are satisfied from the evidence that there was

We are satisfied from the evidence that there was
obtained by the doctor.
the eye was in so bad a condition that the removal was
not that on August 21st, two days after the accident,
it is proven by a physician called as a witness by appell-
ee to corroborated by other witnesses as to this fact; and
for the eye with it covered, using only the right eye; and
appellant some temporary injury of the left eye and worked
before the accident he had, while in the employ of
with the other eye opened, that at one time a few months
the injury in suit here he could see to work and read
produced the injury. The evidence testified that before
was found to the effect that the accident could not have
the accident complained of here, and competent testimony
other instances, caused shown by the evidence, and not from
loss of sight came from that old injury aggravated by some
cent and some weakness. Appellant's contention, to which
injured about eighteen years before that time leaving a
leaving no question about that fact. The eye had been
and there was visible in it a scar and other conditions
1913 the eye was useless so far as sightis concerned
into the right eye. At the time of the trial in May
as during a splinter was by the action of the saw, thrown
1913, operating a steam power driven rip saw, and while
and judgment for $3000 from which the defendant appeals.
Willelle was in the employ of appellant August 25th,

an injury at the time and in the manner charged by appellee which resulted in the loss of sight of his right eye, perhaps because of a weakened condition produced by the old injury. If it be true that the injury in question resulted in aggravating a former disease, and would not have been of so much consequence in the absence of that disease, still that fact affects only the question of damages. Simpson v. Peoria Ry. Co. 179 Ill. App. 307 and authorities there cited.

Appellant says there is no evidence that appellee could see with the right eye immediately before the accident, and therefore a verdict for defendant should have been directed. It is true that appellee's language in stating as a witness the condition of his sight before the injury in question is not so accurate and certain as might be required in a pleading. But when he says, as he does, that he could see with that eye before the accident and offers proof showing that a few months before he did work with the other eye bandaged, the jury would naturally presume that the condition continued up to the time of the injury, and were warranted in so presuming even though he did not expressly state that he could see with that eye one minute or oneday before the accident.

The Court instructed the jury at the request of appellee, "If you find from the preponderance of the evidence in this case that on the 29th day of August, 1912, the plaintiff, Henry O. Forrest, was in the

employ of the Roper Furniture Company, and that said defendant was then and there engaged in the business of manufacturing furniture and operating a factory in which power-driven machines were used , and that on said date the said plaintiff was working in the line of his duty as such employe of said defendant upon a saw operated by steam power, and that said saw was, at the time aforesaid, a power-driven machine, and if you furhter believe from the evidence that the said defendant through its elective officer or officers, intentionally omitted to properly guard or protect said saw as required by law, and that as a result of such omission on the part ofthe defendant as aforesaid, a sliver, piece of board or lumber, was thrown from said saw and into and against the eye and head of the plaintiff while he, the said plaintiff, was working upon said saw in the line of his duty and employment and thereby and therefrom was injured, and thatplaintiff was then and there exercising ordinary care for his safety, you should find the defendant guilty and assess such damages in favor of said plaintiff and against said defendant as you may find from the evidence the plaintiff suffered, if any, as a result of such injury." And at the instance of defendant that "The defendant can be found guilty of an intential omission to safeguard said machinery only in the event that you find from the evidence (1) that it failed to guard the saw in question in the manner required by law, and (2) that its omission was intentional and (3) that the plaintiff was not guilty of any want of ordinary care contributing to his injury, and (4)

that the plaintiff was injured, and (5) that such injury was received by reason of defendant's failure to properly safeguard said saw; so, if you believe from the evidence here that the defendant honestly and in good faith attempted to and did use all the precautions in that respect that a man of ordinary prudence would have employed under like circumstances, having in view the welfare of the workman, the practicability of guarding the machine, and its use, then you cannot find defendant guilty because of an intentional omission to safeguard said saw."

"That it is absolutely essential to plaintiff here in making out his case that he show be a preponderance of the evidence that the saw in question was dangerously defective and used in that condition or not properly safeguarded, and that this omission was with the knowledge of defendant or some elective officer of the same, and that plaintiff was injured, and that said injury was received because of such use or omission. Unless you believe from the evidence that there was such use or intentional omission, and that plaintiff was injured thereby, you should not find defendant guilty because of sympathy, nor yet because of any other neglect, fault, act or omission whatever, even though you believe from the evidence that there was such other neglect, act , fault or omission.

"That even though the defendant were liable for

ths accident in question, still plaintiff could not recover in this case for any damage, which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence he met with the accident complained of and sustained injury at that time. And if you find from the evidence that the plaintiff has now, or has had any other disability, resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted by law to allow him anything for such disability and should not do so from motives of symathy, or any other motives."

"That the law required defendant to properly safeguard the saw in question, but this provision of the law does not mean that defendant should so safeguard said saw as to insure the plaintiff against every possible injury; and that if you believe from the evidence that the defendant so safeguarded the saw in question as to properly protect the plaintiff from coming in contact with the teeth of the saw and against injury in that manner, but did not so safeguard the saw as to prevent plaintiff from possible injury from flying ~~splin~~ slivers or splinters, thrown from the saw, and if you further believe from the evidence that no person of ordinary care and caution would, in the exercise of ordinary care and foresight, have foreseen or apprehended any danger from that source, then the Court instructs you that the

defendant was not guilty of an intentional omission to properly safeguard the saw in question in that respect."

And the Court was asked by appellant to instruct the jury, "That while the law required the defendant to properly guard the saw in question, it did not of necessity require the defendant in so doing to guard the saw with the latest and newest inventions, nor with any guards that would destroy or unreasonably impair its efficiency, nor with such guards as would insure a careless person against injury, nor with such guards as only a person of unusual caution would deem necessary. On the contrary, all that the law required in this respect was that the defendant should so guard the saw as to make it (reasonably) safe for persons exercising ordinary care for their own safety so far as this was practicable and could have been done with reasonable regard for the effeciency of the machine in the kind of work, which was to be done upon it." And gave the instruction modified by striking out the word "reasonably". There were other instructions requested by appellant and given, but the foregoing show the theory of law on which the case was tried. The modification of the last mentioned instruction is much complained of; but appellant offered and the Court refused an instruction in which it was stated that the requirement to make the saw reasonably safe meant to guard against such dangers as might reasonably be apprehanded in the absence of a guard. The instruction

was properly refused because covered by other instructions but there was no error in adopting appellant's definition of 'reasonably safe' in the instruction instead of the term itself, which the Court in effect did in the series of instructions given.

It is argued that appellee's given instruction omits the necessary element of knowledge of defendant of the condition of the machine. The phrase 'intentionally omitted' implies knowledge of the defect as well as the duty. We see no error in that respect.

It is argued that the purpose of the act is to protect workmen from injury in coming in contact with the machine itself and that an accident from dust, or splinters thrown from the work by the action of a wheel or saw is not within its provisions. No authority is cited by appellant on this point. The injury in question here is not from dust or a small particle of wood but from what is properly termed a splinter and it is proven that the saw had therstofore thrown off splinters of considerable size and that there was much danger from that source. In the absence of authority to the contrary we conclude that the danger was within the statutory requirement of protection of workmen.

The evidence leaves no doubt that the condition of the machinery was of long standing and was well known to elective officers of appellant. There was evidence of some effort by way of placing guards to obviate the

danger, but without extending this opinion by a detailed statement of conditions, it is sufficient to say that the evidence showed a condition requiring protection in compliance with the statute and failure of appellant to provide the same, sufficiently at least to sustain the verdict of the jury and forbid a reversal on that ground.

It is argued that the Court erred in permitting testimony that there were guards in use or on the market that were practicable in prevention of such danger. This evidence was substantially the same on that question as in Streator v. Western Scraper Co. 254 Ill. 244, where it was treated as competent.

It is objected that counsel for appellee in cross examining witnesses called attention to the fact that the suit was defended by an insurance company, and it is said this error is one that could not afterwards be corrected by any action of the trial court and was not waived by failure of counsel to object. Many authorities are cited on that point. It is true the jury had nothing to do with that question and information of the fact that an insurance company was defending is likely to prejudice the defense, but in this case the treasurer of appellant, while testifying, without objection stated that he notified the Fidelity Insurance Company of the accident and the fact coming to the knowledge of the jury in this way of which the appellant cannot well complain, subsequent references complained of do not seem to us reversible error.

reversible error.

subsequent references complained of do not seem to me in this way of which the appellant cannot well complain, accident and the fact coming to the knowledge of the jury that he notified the Fidelity Insurance Company of the fact that an insurance company was defending is likely to prejudice the defense, but in this case the treasurer of appellant, while testifying, without objection stated nothing to do with the question and information of the fact on that point. It is true the jury had failure or counsel to object. Many authorities are by any action of the trial court and was not waived by this error is one that could not otherwise be corrected cut the amount recovered by an insurance company, and it is said examining witnesses called attention to the fact that the where it was treated as competent.

It is objected that counsel for appellee in close as in Stratton v. Western Mercher Co. 234 Ill. 314, parable evidence was substantially the same on that question that were practically in prevention of such danger. testimony that there were funds in use or on the person verdict of the jury and forbid a reversal on that ground.

It is argued that the court erred in permitting proving the same, sufficiently at least to sustain the pellant to witness with the statute and failure of appellant to evidence showed a condition requiring protection in consideration of conditions, it is sufficient to say that the statement but without extending this opinion by a detailed danger,

Complaint is made that the Court sustained objections to evidence offered by appellant as to the condition of the machine sometime after the accident. Counsel concede the rule that such evidence is inadmissable without proof or offer of proof that conditions had not changed. We do not see that the Court violated that rule, if he did in some instance still the condition of the machine at the time of the accident was known to so many and could be so readily shown that it would not be reversible error. There are other suggestions of error in admission and rejection of evidence and giving and refusing instructions, but we see no substantial error in the points argued. There is no suggestion in appellant's first brief that the damages are excessive. It is said in its reply brief that they may be so considered. The point if relied on should have been made in the first brief. There is no room for contention of excessive damages except on the theory that the injury was not the proximate cause of the loss of sight. The jury evidently believed that it was, and there was ample evidence to support that conclusion.

Finding no reversible error in the record, the judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5929

1191

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 537

BE IT REMEMBERED, that afterwards, to-wit: on the 21st day of ~~July~~ May, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

—

Gen. No. 5929

Frank Vogel, Jr.

Plaintiff in Error.

vs Error to Rock Island.

City of Rock Island,

Defendant in Error.

Per Curiam.

The court below sustained a demurrer to an amended declaration in the above entitled cause. Plaintiff elected to abide by his amended declaration. A judgment was entered against him for costs. He has sued out this writ of error to review that judgment. A writ of error only lies to review ~~that judgment~~ final judgments. This judgment is not final. In such a state of the case a final judgment would be that plaintiff take nothing by his suit and that defendant go hence without day etc. The proper form is suggested in Wilkinson v Olin, 136 Ill. App. 527. Some of the other cases in point are cited in Seghetti v Berry Coal Co. 164 Ill. App. 488, Under Chicago Portrait Co v Chicago Crayon Co. 217 Ill. 200, if we should undertake to ignore this question we would be acting without jurisdiction. To the same effect is County of Franklin v Blake, 257 Ill. 354. Late authorities are Ajax-Grieb Rubber Co. v Gray 179 Ill. App. 377 and People v Johnson 179 Ill. App. 467. The writ of error is therefore dismissed, with leave to the respective parties to withdraw the papers filed by them.

Writ of error dismissed.

Gen. No. 8994

Frank Vogel, Jr.

Plaintiff in Error.

vs. Error to Rock Island.

City of Rock Island,

Defendant in Error.

Per Curiam.

The court below sustained a demurrer to an amended declaration in the above entitled cause. Plaintiff elected to abide by his amended declaration. A judgment was entered against him for costs. He has sued out this writ of error to review that judgment. A writ of error only lies to review ~~xxxx judgments~~ final judgments. This judgment is not final. In such a state of the case a final judgment would be that plaintiff take nothing by his suit and that defendant go hence without day etc. The proper form is suggested in Wilkinson v Dixon, 136 Ill. App. 587. Some of the other cases in point are cited in Segbetti v Berry Coal Co. 164 Ill. App. 488, Under Chicago Portrait Co v Chicago Crayon Co. 217 Ill. 300, if we should undertake to ignore this question we would be acting without jurisdiction. To the same effect is County of Franklin v Blake, 257 Ill. 354. Late authorities are Ajax-Grieb Rubber Co. v Dyer 179 Ill. App. 377 and People v Johnson 179 Ill. App. 467. The writ of error is therefore dismissed, with leave to the respective parties to withdraw the papers filed by them.

Writ of error dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

1192

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 538

BE IT REMEMBERED, that afterwards, to-wit: on the ~~31~~ 1st day of ~~July~~ May, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5968

H. J. Bennett, appellant.

vs Appeal from Stark.

Fred Nicholson et al appellees.

Opinion Per Curiam.

In this action on a promissory note, after a motion for a new trial had been denied the following entry was made: "It is hereby ordered by the court that judgment be and the same is hereby entered on the verdict." This is the only entry which can be called a judgment in this record and it is from this supposed judgment that plaintiff below prosecutes this appeal. This entry is not a judgment. It does not show for whom or against whom it is rendered. Fitzsimmons v Munch, 74Ill App. 359. People v Jamison, 157 Ill. App. 546. People v Rubright, 160 Ill. App. 528. Bennett v Karasik, 164 Ill. App. 362. Metzger v Morley, 184 Ill. 81. The form of a final judgment for a defendant in such a case is set out in People v Severson, 113 Ill. App. 497, to which form should be added a judgment for costs in favor of the defendant and against the plaintiff.

In view of the fact that another appeal may hereafter be taken in this case we desire to suggest that though a motion for a new trial is embodied in the bill of exceptions there is no recitation in that bill that any verdict was rendered or any motion for a new trial made or any decision of such motion adverse to appellant. Two instructions offered at the close of plaintiff's evidence are contained in the bill of exceptions, but error is assigned on the action of the court on numerous other instructions and they are not contained in the bill of exceptions. The clerk has undertaken to set them out in the record and to show whether they were given or refused. It is not the province of the clerk to certify what instructions were requested by the parties nor what ruling the court made thereon. No judgment having been entered in this case the appeal is premature and is dismissed, with leave to the parties to withdraw all papers filed by them.

Appeal dismissed.

Appeal dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5805

173

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 539

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

At a Court of the Judges of said Court, in the Parish and District aforesaid, at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Second District of the State of Illinois.

Hon. CHARLES WHITNEY, Justice.

Hon. DORRANCE DICKEL, Justice.

CHRISTOPHER C. DAVEY, Clerk.

BE IT REMEMBERED, that afterwards, to-wit: on the 21st day of D. 1914, the opinion of the Court was filed in said Court, in the words and figures

Gen. No. 5805.

Jult L. Hammalle et al

appellees.

vs Appeal from LaSalle.

Lafe Lebensberger,

appellant.

Carnes, P. J.

One William Midnight purchased a residence property in Ottawa Illinois, in October 1904, paying therefor $1200 and afterwards expending in betterments thereon about $300 He and his wife occupied it as a homestead from the time of the purchase until they sold and conveyed it to appellees Thomas Tully and Jult Hammalle February 16, 1911, for $489.75 subject to a mortgage of record that they had placed upon the same while they owned and occupied it as a homestead, on which there was then owing $910.25. Eight days before this transaction, and long after the record of said mortgage, there was filed in the office of the Circuit Clerk of LaSalle County a transcript of a judgment obtained in Justice Court against Midknight and wife in favor of appellee Louis Stern & Company, for $300 and costs; execution issued thereon and without any attempt to set off the homestead as provided by statute it was levied on the property, and a sale followed April 8,1911 at which sale appellant Lafe Lebensberger received a Sheriffs Certificate of sale on his bid of $225.33.

Hammalle and Tully filed a bill in this case to set aside said sale and certificate as a cloud on their title. Issues of fact were joined; the case was submitted to the Master to take proofs and report; he reported the proofs taken by him, with a recommendation that a decree be entered as prayed in the bill objections and exceptions were filed and passed upon and a decree entered granting the relief prayed.

There is no contention that the judgment is for a debt for which the homestead is liable. It is admitted that it would be a lien on any real property of Midnight and wife, subject to such a lien, and that the deed and mortgage mentioned are properly executed and acknowledged to convey the homestead interest of Mifnight and wife. Appellant says the controlling question is whether the property was worth more than $1000 in excess of the mortgage debt. There was conflicting testimony on that question and the master found that the property was not worth more than $1600 which is less than $700 in excess of the mortgage indebtedness. We are of the opinion that the evidence sustains this finding. It is common knowledge that apparently trustworthy witnesses will differ widely in estimates of market value of real estate and the result of their testimon y often is a verdict or finding quite different from what would be reached by a computation to find the average of the opinions. It is peculiarly a case where the decree should not be disturbed unless clearly and palpably contrary to the weight of the evidence.

If Midnights interest in the property had been more than $1000 the purchaser at the sale might, under appropriate pleadings, have had relief; Krupp v Brand, 300 Ill. 403, and cases there cited and reviewed, but being worth less than that sum he acquired by his purchase no equitable or legal rights id. Appellantx contends that a purchaser at execution sale of homestead property worth $1000 or less at the time of the purchase, acquires the right at his option during the redemption period to havethe homestead set off or tender $1000 for its satisfaction. Such a right if it exists might be of some value enabling a purchaser to acquire an option on the property, but as we read the cases no such privilege is allowed and we hold that a purchaser at an execution sale

of homestead property worth less than $1000 without the homestead being set off as provided by law, acquires no title or right, legal or equitable, in or to the property.

It is urged that the bill is bad because complainants did not plead the Homestead Exemption Statute, and did not aver that the value of the premises was less than $1000 in excess of the judgment. The bill sets out Section 1 of said Act, and it is argued that it should also have set out Section 4 of the same Act. It was not necessary ~~id~~ to do either. It is necessary in some cases to plead a statute, that is by apt words, to show that the aid of the Statute is invoked, as in cases of the Statute of Limitations and the Statute of Frauds, but it is never necessary to recite in pleadings a public statute; this is elementary doctrine. C. & A. R. R. Co. v Dillon, 183 Ill. 570. The allegation in the bill as to the value of Midnight's interest in the premises may be by inference only, but the defendants seem to have understood it, and in their answer "deny that the actual value of the equity of complainants" grantor in said premises was but the sum of $489.75"; both parties introduced evidence on that issue, and it is too late now to raise the question.

It is argued that the reference to the master only required him to report, and should be construed to require only a report of the evidence, and not of his conclusions. If there is anything in this point it was waived by appellant's appearing before the Master and the Court with objections and exceptions to the report without raising that question, and is also immaterial because the decree is based on the finding of the court from the evidence reported by the Master.

It is urged that the court should not have decreed costs against appellant, who is said to be an innocent purchaser.

The decree orders appellant and the judgment creditor to pay the costs. We see no error in that provision. There is no question of innocent purchaser involved, appellant purchased after appellees' deed was of record, which on its face recited that the premises were the homestead of Midnight. It is urged that the court erred in declaring the judgment void. The decree finds the judgment and proceedings under it, void and of no effect "as against complainants", and the order following, that they be set aside as a cloud upon the title of complainants, is to be read with that finding, and not construed as an order avoiding the judgment against Midnight and wife, who were not parties to the suit.

Finding no error in the record the decree is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5950

(1200

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 574

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

J. C. MIDDAKE, Orator.

CHRISTOPHER C. MAHEY, Clerk.

CHARLES WHITNEY, Justice.

DONEMACH DIBELL, Justice.

Gen. No. 5950.

Camille F. Ribordy, appellant.

vs Appeal from Whiteside.

Commissioners of Drainage District

No. 3. 7c. appellee.

Carnes, P. J.

This is a suit in equity in which appellant Camille F. Ribordy, is asking that appellee, a Drainage District organized under the Farm Drainage Act, be decreed to refund to him certain moneys he paid under a void assessment. Failing to obtain all the relief he prayed he prosecutes this appeal.

The lands of the District are located in the counties of Lee and Whiteside; and while appellant was treasurer and one of the Drainage Commissioners, and the owner of lands in the district, it undertook to levy and collect an assessment of $9000 for doing certain work in the District. Appellant paid to himself as treasurer $504 the amount assessed against his land, and three other land owners paid their assessments to him, aggregating $403.38, making total assessments collected and in his hands $907.38. The remaining land owners refused to pay their assessments and they were returned delinquent to the County Treasurers of Lee and Whiteside Counties respectively. On application for judgments in those counties objections were filed in each county, and sustained in Whiteside and no appeal taken. The county court of Lee County struck the objections from the files and entered judgment as applied for. The objectors appealed from that judgment to the Supreme Court and it was there reversed and the cause remanded . (The People v Welch, 352 Ill. 167.) No further effort was made to collect the assessment. Appellant says in his brief that it was established in the courts that the entire

Cas. No. 5855.

Camilla F. Mihordy, appellant.

vs Appeal from Whiteside.

Commissioners of Drainage District
No. 3, Tc. respellee.

Carnes, P. J.

This is a suit in equity in which appellant Camilla F. Mihordy, is asking that appellee, a Draining District organized under the Farm Drainage Act, be decreed to refund to him certain moneys he paid under a void assessment. Failing to obtain all the relief he prayed he prosecutes this appeal.

The lands of the District are located in the counties of Lee and Whiteside; and while appellant was treasurer and one of the Drainage Commissioners, and the owner of lands in the district, it undertook to levy and collect an assessment of $5000 for doing certain work in the District. Appellant paid to himself as treasurer $504 the amount assessed against his land, and three other land owners paid their assessments in full, aggregating $403.38, making total assessments collected and in his hands $907.38. The remaining land owners refused to pay their assessments and they were returned delinquent to the County Treasurers of Lee and Whiteside Counties respectively. On application for judgments in those counties objections were filed in each county, and sustained in Whiteside and no appeal taken. The county court of Lee County overruled the objections from the files and entered judgment as applied for. The objectors appealed from that judgment to the Supreme Court and it was there reversed and the cause remanded . (The People v Welch, 282 Ill. 127.) No further effort was made to collect the assessment. Appellant says in his brief that it was established in the courts that the entire

proceedings under which the assessment was levied were null and void, and while appellee questions that statement, we will consider the case on the assumption that the proceedings were void.

Incident to making and endeavoring to collect this assessment there were necessary expenses incurred, attorneys fees, court costs, etc. amounting to $585.22, of which $405.72 was paid out of the $907.38 so in the Treasury, before this bill was filed, and more than half of it by appellant while acting as treasurer. There was $179.50 unpaid, of which $147.50 was due the Court Reporter for services in the litigation referred to, and this item appellant as commissioner had voted to pay. There is no question that all the items that go to make up the $585.22 were charges incurred in the attempt to make and collect the assessment, and it is not claimed that they should not have been paid had the assessment been valid.

Before commencing this suit appellee sold his farm and ceased to be Treasurer ~~ex~~ of the District, and voluntarily turned over the balance of the $907.38 in his hands to his succeddor in office. The prayer of his bill is, that appellee be restrained from expending any moneys paid into the treasury by appellant for the purpose of paying any cost or expenses attendant upon the levy and collection of said $9000 assessment and proceedings preliminary thereto, And that it be required to repay to appellant the full amount of the assessment paid by him or if they have expended any of said moneys and therefore cannot repay the whole of said sum, that they be decree to pay such portion of said sum as they have in the Treasury and levy an assessment to make up the deficiency and on its collection pay the same to appellant.

The decree ordered appellee to return to appellant $178.91 of the money so paid by him and retain the balance. This result

of the money so paid by him and retain the balance. This result
and on its collection pay the same to appellant.

The decree ordered appellee to return to appellant $178.81
Treasury and levy an assessment to make up the deficiency
be decree to pay such portion of said sum as they have in the
and therefore cannot repay the whole of said sum, that they
said sum paid by him or if they have expended any of said moneys
required to repay to appellant the full amount of the assess-
ment and proceedings preliminary thereto. And that it be
attendant upon the levy and collection of said $3000 assess-
ment by appellant for the purpose of paying any cost or expense
be reimbursed from expending any moneys said time the treasury
overpaid in effect. The power of his bill is, that appellee
turned over the balance of the $807.28 in his hands to his
and ceased to be Treasurer &c of the District, and voluntarily
they should not have paid and the assessment been valid.

Before commencing this suit appellee sold his farm
up the $885.28 were charges incurred in the attempt to make
and collect the assessment, and it is not claimed that
there is no question that all the items that go to make
farmed to," and thereon appellant as commissioner had voted to
was due the Court Reporter for services in the litigation re-
mating as treasurer. There was $170.50 unpaid, of which $147.50
was filed, and more than half of it by appellant while
$807.28 so in the Treasury, before this bill
ment there were necessary expenses incurred, attorneys fees,
court costs, etc. amounting to $585.28, of which $408.72 was

. Instead to making and endeavoring to collect this assess-
ment void.

connection the case on the assumption that the proceedings were
proceedings under which the assessment was levied were null
and void, and while appellee questions that statement, we will

is reached on the theory that the $907.28 is a proper fund from which to pay the expenses incurred, and that appellant's money should bear its proportionate share of the burden.

This conclusion seems to us reasonable and equitable. It has been held in many Illinois cases that drainage commissioners can not create a debt and then levy an assessment to pay it. We know of no legal proceeding in which appellee might collect the money to pay appellant that part of his assessement that had already been expended. Vandalia Drainage District v Hutchins, 234 Ill. 31; and Martin v Union Drainage Dist. No. 5, 150 Ill. App. 408, with the authorities there cited and discussed, sufficiently point out the law in that respec t. Therefore the court could not grant the prayer of the bill that appellee be required to levy an assessment to raise money to reimburse appellant. This objection however does not go to the whole relief prayed; it was possible for appellee to return that part of the money still in its treasury and a decree might have been entered to that effect. But we are of the opinion that the court did not err in refusing to do so. It is suggested by counsel that appellant as an individual is something entirely different from himself as a commissioner of this district. This is true in a sense. Appellee as a corporation is an equity to be considered by itself; appellant occupied the dual position of agent for the corporation and an individual with whom it was dealing. As agent appellant, with others, led his principal to do an unauthorized and void act and to incur expenses that it had no power to pay. He voluntarily paid money into the treasury to be used in carrying on this unauthorized undertaking; and whatever might be said of his rights had he not been an agent of appellee aiding in incurring the expense, it seems to us that he is not now in a position to ask a courtof equity to decree a

return of his money and leave unpaid just claims, in the creation of which he was an active participant.

The decree is affirmed.

return of his money and leave unpaid just claims, in the
. cessation of which he was an active participant.

The decree is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5953

1201

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 576

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5953.

Elias B. Anderson, appellant.

vs Appeal from Whiteside

William P. Benson et al appellees.

Carnes, P. J.

This is a suit in equity brought by Elias B. Anderson, appellant , in September 1911, to compel an accounting by appellees William P. Benson, Louis A. Bittorf and Herman V. Bittorf, of profits made in manufacturing "Big Four Barn Door Hangers", a patented article which appellant alleges he invented and furnished a sketch of to appellees about ten years before this suit was begun, and that appellees then promised if they couldmake use of the invention they would do so and inform appellant and pay him what it was reasonably worth.It is alleged that appellees immediately begun and ever since continued the manufacture of said article in large quantities, and sold it all over the United States, obtaining a patent therefor as the invention of appellee Benson; and that appellant did not learn of such manufacture and sale till just before filing his bill herein .

Appellees answered February 3rd. 1913, denying the allegations of fact on which rested the conclusion that appellant was the inventor of the article, and denying any contract or agreement with him in relation to the same, and claiming it was the invention of Benson.

On issues so formed the cause was referred to the master May 4, 1913, to take and report proofs with his conclusions. Afterwards, while the case was pending before the Master, appellees moved the court for leave to file a plea of the Statute of Limitations, which motion the Court continued until the final disposition of the case.

Cen. No. 2824.

Elias T. Ambrose, appellant.

vs

Appeal from Whitesides

William P. Benson et al appellees.

Gaynor, P. J.

This is a suit in equity brought by Elias T. Ambrose, appellant, in September 1921, to cancel an assignment by appellees William P. Benson, Louis A. Bittorf and Herman V. Bittorf, of profits made in manufacturing "Big Four Duty Sheet Impeyers", a patented article which appellant alleges he invented and furnished a sketch of to appellees a out two years before this suit was begun, and that appellees then promised if they could make use of the invention they would do so and inform appellant and pay him what it was reasonably worth. It is alleged that appellees immediately began and ever since continued the manufacture of said article in large quantities, and sold it all over the United States, obtaining a patent therefor as the invention of appellee Benson; and that appellant did not learn of such manufacture and sale till just before filing his bill herein.

Appellees answered February 3rd, 1923, denying the allegations of fact on which rested the conclusion that appellant was the inventor of the article, and denying any contract or agreement with him in relation to the same, and claiming it was the invention of Benson.

On issues so formed the cause was referred to the master May 4, 1923, to take and report proofs with his conclusions. Afterwards, while the case was pending before the Master, appellees moved the court for leave to file a plea of the Statute of Limitations, which motion the Court continued until the final disposition of the case.

On the hearing before the Master there was a sharp conflict of evidence ,and his decision necessarily depended on the credit given by him to the testimony of conflicting witnesses. He reported that on a consideration of the merits of the case he found the complainant had failed to establish by a preponderance of the evidence, his alleged arrangements with the defendants, and recommended the dismissal of the bill for want of equity. Objections were filed and overruled, followed by a hearing on exceptions before the Chancellor, who during such hearing allowed the motion, before mentioned, to file a plea of the Statute of Limitations, which plea was filed and issue joined thereon. The court on hearing of all issues so presented, including those arising on exceptions to the Master's report, entered a decree approving and confirming the Master's report, and further finding that the complainant's right of action is barred by laches, and dismissed the bill.

The finding of facts by the Master approved by the Chancellor, without reference to the question of laches, concludes appellant and supports the courts action in dismissing his bill, unless we can say "The decree was clearly and palpably contrary to the weight of the evidence." This is familiar law and the above quotation is from Merry v Bergfeld, 364 Ill. 84. A reading of the record leads us to the conclusion that the Master correcty weighed the evidence, therefore the decree must be affirmed.

It is not necessary to pass on the question of laches, but there was evidence to the effect that the hanger in question had been in use for several years at a place where appellant must have seen it repeatedly, and the allegations of the bill are that it had been extensively manufactured and sold. These considerations not only tend to support the defense of laches

In the hearing before the Master there was a sharp conflict of evidence, and his decision necessarily depended to a large extent upon which witnesses he believed. He reported that on a consideration of the merits of the case he found the complainant had failed to establish by a preponderance of the evidence, his alleged arrangements with the defendants, and recommended the dismissal of the bill for want of equity. Objections were filed and overruled, followed by a hearing on exceptions before the Chancellor, who during such hearing allowed the motion, above mentioned, to file a plea of the Statute of Limitations, which plea was filed [illegible]. The latter on hearing of all issues so presented, including those arising on exceptions to the Master's report, entered a decree finding and sustaining the Master's report, and further finding that the complainant's right of action is barred by laches, and dismissed the bill.

The finding of facts by the Master approved by the Chancellor, without reference to the question of laches, constitutes appellant and supports the court's action in dismissing his bill, unless we can say "The decree was clearly and plainly contrary to the weight of the evidence." This is Pacific law and the above quotation is from Henry v Dargenda, 364 Ill. 84. A reading of the record leads us to the conclusion that the Master correctly weighed the evidence, [illegible] who is not to be altered.

It is not necessary to pass on the question of laches, but there was evidence to the effect that the danger in question had been in use for several years at a place where appellant must have seen it repeatedly, and the allegations of the bill are that it had been extensively manufactured and sold. These considerations not only tend to support the defense of laches

but also to a lack of confidence in the testimony of appellant that he was the author of the invention and had not before asserted his rights because he did not know of its use.

The decree is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5957

1202

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 578

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

REMEMBERED, that afterwards, to-wit: on the 5th day
D. 1914, the opinion of the Court was filed in
's office of said Court, in the words and figures

Gen. No. 5957

Orin Sherman, appellee

vs Appeal from Stark.

Simeon P. Ash, appellant.

Carnes P. J.

Appellant Simeon P. Ash, a keeper of a general store, on January 17, 1914 missed about Two Hundred dollars in money, which he thought he had taken from his house that morning and hidden in his store. Appellee Orin Sherman was in the store that morning with another man. In the evening appellant asked these two men to meet him in a room over his store which they did, and appellee claims that while there appellant accused him of stealing the money; and he brought this action of slander, alleging in his declaration words spoken by appellant amounting to a charge of larceny. The money was found soon after the evening occurence under circumstances that entirely relieved appellee from any suspicion of theft. Appellant filed a plea of not guilty and there was a jury trial resulting in a judgment against him of $500 from which he appeals.

The errors urged in the argument are: That there is no evidence of the speaking of the slanderous words charged in the declaration; that the verdict is against the weight of the evidence; that the court erred in permitting evidence of slanderous words spoken by appellant other and different from those charged in the declaration; and that the jury did not follow the instructions of the court.

Appellee in his brief calls our attention to the fact that the abstract does not set out the judgment, motion for a new trial and various other matters which appellant assumes in his argument. There is some ground for this complaint, and we

Sup. No. 1091

Cora Conway, appellee

vs Appeal from Stark.

Simeon P. Ash, appellant.

Opinion P. J.

Appellant Simeon P. Ash, a keeper of a general store, on January 17, 1914 missed about Two Hundred dollars in money, which he thought he had taken from his house that morning and hidden in his store. Appellee Orin Bowman was in the store that morning with another man. In the evening appellant asked these two men to meet him in a room over his store which they did, and appellee claims that while there appellant accused him of stealing the money; and he brought this action of slander, alleging in his declaration words spoken by appellant amounting to a charge of larceny. The money was found soon after the evening occurrence under circumstances that entirely relieved appellee from any suspicion of theft. Appellant filed a plea of not guilty and there was a jury trial resulting in a judgment against him of $500 from which he appeals.

The errors urged in the argument are: That there is no evidence of the speaking of the slanderous words charged in the declaration; and that the jury did not follow the instructions of the court.

Appellee in his brief calls our attention to the fact that the abstract does not set out the judgment, motion for a new trial and various other matters which appellant assumes in his argument. There is some ground for this complaint, and we

have turned to the record and find there is no certificate of the Judge who tried the case, that the bill of exceptions contains all the evidence heard on the trial, although the abstract contains such a statement, that seems to be the assertion of the abstractor rather than an abridgement of the record; neither is there a certificate of the court that any instructions were offered, given or refused, though several instructions are copied in the record. There may be enough in the bill of exceptions to show that a peremptory instruction to find for the defendant was asked and refused, but if so we must presume the action of the court was warranted. In the absence of a certificate of the court that the bill of exceptions contains all of the evidence a reviewing court will not examine the record to determine whether the evidence there shown sustains the verdict. Cogshall v Beesley, 76 Ill 445; Marske v Willard, 68 Ill. App. 83; Young v City of Fairfield, 173 Ill. App. 311; the action of the trial judge will be presumed to be sustained by the proofs. Millers v Whittier Machine Co. 170 Ill. 434; Under the rule announced in the foregoing cases, which we cannot disregard, there is little left to decide or discuss. The court did not err in admitting proof of words spoken by appellant other than those laid in the declaration if there was evidence otherwise of the speaking of the words charged; Schmissaur v Kreilich, 98 Ill. 347; Rausch v Anderson, 75 Ill. App. 536. There was evidence of the speaking of enough of the words charged to support the declaration. There is no complaint that the judgment is excessive and even were we at liberty to disregard the rules governing the certifying of the record, and assume that we have it complete before us, we would be of the opinion that substantial justice has been done in substantial compliance with the rules of law.

The judgment is affirmed.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5909

1206

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 598

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

5309

Gen. No. 5909

B. J. Loftus, appellee

vs Appeal from Co. Ct. Lake.

Herman Behrens, appellant.

Dibell, J.

This action was originally brought before a justice of the peace and there plaintiff had judgment. Behrens, the defendant below, took an appeal to the county court and upon a jury trial, there was a verdict and judgment in favor of the plaintiff for $100 from which the defendant below appeals.

This suit was brought by appellee to recover the price of a corn shredder, which appellee claimed to have sold appellant for $100. It appears from the evidence that in the fall of 1913 Loftus met Behrens, the appellant, in a barber shop. Behrens there offered appellee $100 for the corn shredder and appellee accepted the offer by saying: "You have bought it, it is your shredder." Appellant then asked if the shredder was in good condition, and appellee replied that it was. Appellant then claims that he then qualified his offer by stating that he would take the shredder if it was in good condition. This is denied by appellee. The evidence on this subject is conflicting. Appellee heard nothing more from appellant regarding this sale for several months, until he finally asked appellant for the purchase price, and appellant then told him he did not intend to buy it. Appellant claims to have thought the matter over after his offer of $100 was accepted by appellee, and then to have examined the shredder, and to have made up his mind as a result of such examination that he did not wish to purchase it.

It is clear from the evidence that the jury were

It is clear from the evidence that the jury were

warranted in finding that appellant made an unqualified offer of $100 for the shredder and that this offer was accepted without qualificationby appellee. Appellant does not attempt to prove that he made any complaint to appellee regarding the alleged bad condition of the shredder, nor that he gave appellee any notice whatever that he did not intend to carry out the bargain. Nothing was said by either of the parties at any time regarding the delivery of the shredder and appellant knew where it was, and it is evident that no delivery was conte plated by either of the parties. As betwenn the parties, delivery is not essential to complete the sale, unless so intended by them. Corgan v Frew, 39 Ill. 31; Kohl v Lindley, 39 Ill. 195; Seckel v Scott, 66 Ill. 106; Harrow v Window, 71 Ill. 214; Webster v Granger 78 Ill 230. In our judgment the evidence warranted the jury in sustaining the contention of appellee that the offer was made and accepted, and that appellant should be required to carry out the terms of his bargain. Appellant contends that there could be no contract unless there was a meeting of minds, but the evidence justified the jury in finding that there was such a meeting of the minds, but that for some reason or other appellants afterwards made up his mind to recede from the bargain. Moreover the court at the request of appellant instructed the jury that if his purchase was, provided that the shredder was in the same condition as when he had previously seen it, and if at the time of the contract the shredder was not in the same condition as whnn defendant had previously seen it, then they should find for defendant. The verdict for appellee decided this question against appellant, and the trial court approved that conclusion.

Complaint is made on instruction No. 1, given at the request of appellee, both because it is alleged to lay down a contradictory rule to the other instructions in the case

and,mislead the jury, and also because the words "your verdict" were underscored. The instruction told the jury that an unqualified offer and acceptance constitute a valid sale of chattel property, and that, if they believed from the evidence that the defendant made an unqualified offer for the property in question, which was accepted by theplaintiff, and if the parties then intended the sale to be complete, that their verdict should be for the plaintiff. We are unable to see that any harm could have been done to appellant by the underscoring of the words "your verdict" and we are satisfied that the instruction laid down a correct principle of law.

We find no reversible error in the record and the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5920

1208

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 607

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5920.

W. D. Chemical Company, appellee.

v. Appeal from Peoria.

K. F. Thomas, appellant.

Dibell, J.

It is said that on the 23rd. day of June 1913, the W. D. Chemical Company obtained a judgment by confession in the Circuit Court of Peoria County against K. F. Thomas in the sum of $168.82 and costs and had execution therefor. On August 18, 1913, an attorney for the said K. F. Thomas came into court at the same term and moved that said defendant be allowed to plead, as he had a meritorious defense of fraud and failure of consideration. In support of that motion the defendant K. F. Thomas, filed an affidavit by himself to the effect that he was a hog raiser and a liveryman at Lanark Illinois; that he had been accustomed to buying stock food of the Council Bluffs Company through its agent, G. G. Cleveland; that the said Cleveland at the time he procured the order in question falsely represented to Thomas that he was still the agent for the Council Bluffs Company and selling its remedies; that Thomas so believing gave his order as he thought for the goods of the Council Bluffs Company, but upon their arrival found that they were the goods of the W. D. Chemical Company and not of the Council Bluffs Company, wherefore he refused to accept said goods; and that said goods are now in the freight depot at Lanark, Illinois, subject to the order of the W. D. Chemical Company. The affidavit further stated that Thomas did not find out the deception of the said Cleveland until told by others that Cleveland had deceived them in the same way; that he did not know that the Council Bluffs Company and the W. D. Chemical Company were two separate concerns, nor did he know that Cleveland had ceased to work for the Council

Bluffs Company, and that at the time of giving said order was working for the W. D. Chemical Company, but was lead to believe that Cleveland was still working for the former Company Later, the said Thomas filed another affidavit in the same cause, which contains similar allegations to those in the first affidavit, besides allegations that the said Cleveland induced Thomas to sign an order for certain stock food by fraud and false pretenses; that he Thomas, never signed or authorized anyone to sign the note sued on; and that the note sued on was forged. On September 10, 1913, an order was entered in this cause denying the motion of the defendant, Thomas, and directing the sheriff to proceed under the execution theretofore issued. Thereupon the defendant prayed an appeal to this court from the order of said circuit court overruling said motion, and a bill of exceptions was signed and filed. No other proceedings or documents appear in the record before us. A judgment by confession in favor of appellee against appellant is contained in this record, but it is not certified by the clerk and therefore is not properly before us. The declaration and the instrument sued on are not set out in the record and as the judgment of the Court is not certified to us, there is nothing before us to review. The only motion by appellant shown in the bill of exceptions is a motion that he be allowed to plead on the ground that he had a meritorious defense of fraud and failure of consideration. The assignments of error are that the Court erred in overruling the appellant's motion to set aside the judgment, but as the record does not disclose that there was any motion to set aside the judgment, the record presents no question. A motion for leave to plead cannot be construed as a motion to set aside a judgment. The first affidavit filed in support of the motion for leave to plead states that appellant gave an order for certain stock food to a certain

agent and that he supposed that agent was acting for one company, and it transpired he was agent for an entirely different company, and that appellant would not have brought the second company's stock food had he known the circumstances. The affidavit further sets up that appellant was induced to believe certain things, without stating what was said or done to induce him to believe those things, nor was any showing made that appellant had a right to rely upon such representations, nor does he show who induced him to believe them, nor does he state in either of the two affidavits filed, that this suit was to recover the price of said stock food. The second affidavit states that he did not sign the note sued on, nor authorized it to be signed and that said note is a forgery. There is nothing in the judgment or record before us to show that the case is based on any note whatever, nor that the suit was to recover the price of the stock food.

Appellee moved to strike the bill of exceptions from the files for various reasons, and we took that motion with the case. The only tenable reason for said motion was that the bill of exceptions was not filed in the court below, but it turns out upon an examination thereof that it does not purport to have been so filed. The motion to strike the bill of exceptions from the files will therefore be denied.

The record before us presents no question for our consideration and the appeal will therefore be dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5931

1209

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 609

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

James Brack, Appellee
vs.
B.F.Berry Coal Company, Appellant. } Appeal from Putnam.

DIBELL. J. On January 17th, 1912, James Brack was in the employ of the B. F. Berry Coal Company as a miner in its coal mine at Standard, Illinois, and had been working there in that capacity for about eighteen months. While working that day in the mine, coal and rock, composing the roof of the room in which he was working, fell on him and he was injured. He brought this suit in the Circuit Court of Putnam County, to recover damages for the injuries so sustained, and upon a jury trial recovered a verdict in the sum of Fifteen Thousand Dollars. A motion for a new trial was overruled and judgment was entered on the verdict, from which the defendant below appeals. Appellee has filed no briefs in this court.

The declaration consisted of two counts. It was alleged in the first count that on the day in question the defendant owned and operated a certain coal mine in the County of Putnam, in which plaintiff was working as a miner; that the roof of the room in which plaintiff was working was in an unsafe and dangerous condition and that plaintiff desired to use props and timbers for securing said rood; that he then and prior thereto demanded of defendant props and timbers of suitable dimensions for securing

James Brack, Appellee
vs. Appeal from Putnam.
S.V.Berry Coal Company, Appellant.

DIBELL. 1. On January 17th, 1913, James Brack was in the employ of the S. V. Berry Coal Company in a mine in its coal mine at Hennepin, Illinois, and was working there in that capacity for about eighteen months. While working that day in the mine, coal and rock, commonly the roof of the room in which he was working, fell on him and he was injured. He brought this suit in the Circuit Court of Putnam County, to recover damages for the injuries so sustained, and upon a jury trial recovered a verdict in the sum of Fifteen Thousand Dollars. A motion for a new trial was overruled and judgment was entered on the verdict, from which the defendant below prosecutes. Appellee has filed no briefs in this court.

The declaration consisted of two counts. It was alleged in the first count that on the day in question the defendant owned and operated a certain coal mine in the County of Putnam, in which plaintiff was working as a miner; that the roof of the room in which plaintiff was working was in an unsafe and dangerous condition and that plaintiff desired to use props and timbers for securing said roof; that he then and prior thereto demanded of defendant props and timbers of suitable dimensions for securing

the roof and that the defendant willfully failed to provide the plaintiff with such props and timbers, whereby the roof fell and plaintiff was injured while in the discharge of his duties. The second count alleged that at the date in question there was a statute in force in this state requiring the mine manager of a mine to provide a sufficient number of props and timbers when demanded for the purpose of securing the roof of the mine; that it was the duty of the defendant to comply with the law, and that the plaintiff on the day in question and prior thereto had made proper demand as provided by law upon the defendant for suitable props and timbers for securing the roof of the mine; that the defendant willfully, knowingly and consciously failed to comply with such provisions of the law, and because of such failure the plaintiff was injured. Paragraph 6 of Section 20 of Chapter 93 of the Revised Statutes of this State, relating to mines and miners, is as follows: "He(meaning the mine manager) shall provide a sufficient number of props, caps, and timbers, when demanded, delivered on the miners' cars at the usual place, in suitable lengths and dimensions for the securing of the roof by the miners." This statute places upon the mine manager the duty of furnishing the required props when demanded of him, and the demand must be made of the mine manager himself, and a demand made upon a driver or any other agent or servant of the company is not sufficient to create a cause of action, unless it be shown that there was an express rule or a recognized custom in the mine to make the demand upon an agent or servant other than the mine manager. Henrietta Coal Co. vs. Martin, 221 Ill.,460. Donk Bros. Coal & Coke Co.vs.Lucis, 226 Ill.,23, There is no evidence

the roof and that the defendant wilfully failed to provide the plaintiff with such props and timbers, whereby the roof fell

The second count alleged that on the date in question there was a statute in force in this state requiring the mine manager of a mine to provide a sufficient number of props and timbers when demanded for the purpose of securing the roof of the mine; that it was the duty of the defendant to comply with the demand; and that the plaintiff on the day in question and prior thereto had made proper demand as provided by law upon the defendant for suitable props and timbers for securing the roof of the mine; that the defendant wilfully, unjustly and unreasonably failed to comply with such provisions of the law, and because of such failure the plaintiff was injured.

Paragraph 3 of Section 20 of Chapter 59 of the Revised Statutes of this State, relating to mines and miners, is as follows: "[illegible] the mine manager) shall provide a sufficient number of props, caps, and timbers, when demanded, delivered on the nearest part of the usual place, in suitable lengths and dimensions for the security of the roof by the miners." This statute places upon the mine manager the duty of furnishing the required props when demanded of him, and the demand must be made of the mine manager himself, and a demand made upon a driver or any other agent or servant of the company is not sufficient to create a cause of action, unless it be shown that there was an express rule or a recognized custom in the mine to make the demand upon an agent or servant other than the mine manager. Bartelts Coal Co. vs. Hardy, 211 Ill. 160. Last Bros. Coal & Coke Co. vs. Lucia, 226 Ill. 23. There is no evidence

in the record before us of any demand by appellee upon the mine manager for props, There is evidence that appellee had requested a certain driver to furnish him with props, but we do not consider that the evidence in that particular is sufficient to show an established custom or an express rule in the mine that the props might be so ordered of a driver in derogation of the statute quoted. Therefore the evidence did not establish a cause of action or authorize a verdict for plaintiff.

Instruction No. 3 given at the request of appellee was as follows:

> The Court instructs the jury that it was the duty of the defendant to always supply a sufficient supply of props and timbers delivered on miners' cars, at the usual place when demanded as nearly as possible of suitable lengths and dimensions for the securing of the roof by plaintiff, as explained in these instructions.
>
> And, if you believe, from the greater weight of the evidence, under the instructions of the court, in this case, that the defendant wilfully or knowingly failed to supply to plaintiff a sufficient supply of props and timber, delivered on miners' cars, at the usual place, when demanded by plaintiff, as explained in these instructions, as near as possible of suitable lengths and dimensions for the securing of the roof in question by plaintiff of said room, and that by reason thereof said roof fell, injuring plaintiff, then you should find the defendant guilty under the first count of this declaration.

This instruction was erroneous in that it required appellant to supply props when demanded, with no explanation as to the requirement of the statute that the demand should be made upon a certain person. This instruction should not have been given.

Instruction No. 27 requested by appellant but refused, was as follows:

is the record before us of any demand by appellee upon the mine
owner for proof. There is evidence that appellee had requested
a certain [illegible] proof, but we do not consider
that the evidence in that particular is sufficient to show an
established custom by an express rule in the mine that the proof
must be produced [illegible] operation of the statute quoted.
Therefore the evidence did not establish a cause of action or
[illegible] a verdict for plaintiff.

Instruction No. 3 given at the request of appellee was
as follows:

[illegible]

This instruction was erroneous in that it required
appellant to supply proof when demanded, with no explanation as to
the requirement of the statute that the demand should be made upon
a certain person. This instruction should not have been given.

Instruction No. 2Y requested by appellant but refused, was
as follows:

" If the jury believe from the evidence that the injury to plaintiff was caused by his own want of care, and not by reason of any violation of law on the part of the defendant, Then the jury should find the defendant not guilty."

This instruction should have been given and the failure of the Court to do so constitutes reversible error in itself. While contributory negligence on the part of appellee would not have constituted a defense had appellant been guilty of a violation of the law, yet appellant was entitled to have the jury instructed that if it did not violate the law and the injury was caused by the negligence of appellee, appellee could not recover. It is the theory of appellant that there were plenty of props in the room where appellee was at work when injured and that it was due to appellee's negligence in not using the props that he was injured. Upon this point there is evidence that immediately after the accident there were twenty-three unused serviceable props in that room, and it is not at all clear but what appellee could have avoided the accident by the use of such props and that reasonable care required him to use them, and that his failure to do so was the cause of his injury. If so and if appellant did not violate the law or if appellee's injury did not result from a violation of the law by appellant, then appellee could not recover.

The judgment of the Court below is therefore reversed and the cause remanded.

Reversed and remanded.

" If the jury believe from the evidence
that the injury is sufficiently caused by
his own want of care, and not by reason of any
violation of law on the part of the defendant,
then the jury should find the defendant not
guilty."

This instruction should have been given and the failure of the Court to do so constitutes reversible error in itself.

While contributory negligence on the part of appellee would not have constituted a defense had appellant been guilty of a violation of the law, yet appellant was entitled to have the jury instructed that if it did not violate the law and the injury was caused by the negligence of appellee, appellee could not recover. It is the theory of appellant that there were plenty of people in the room where appellee was at work when injured and that it was due to appellee's negligence in not using the ropes that he was injured. Upon this point there is evidence that immediately after the accident there were twenty-three unused serviceable ropes in that room, and it is not at all clear but what appellee could have avoided the accident by the use of such ropes and that reasonable care required him to use them, and that his failure to do so was the cause of his injury. If so and if appellant did not violate the law or if appellee's injury did not result from a violation of the law by appellant, then appellee could not recover.

The judgment of the Court below is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5940

1210

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 610

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IT REMEMBERED, that afterwards, to-wit: on the 31st day
A. D. 1914, the opinion of the Court was filed in
Clerk's office of said Court, in the words and figures
to-wit:

Gen. No. 5940.

Ella McCorkle, appellant.

vs Appeal from Peoria.

Estate of John McGinnis, appellee

Dibell, J.

In his lifetime John McGinnis was a resident of Peoria and suffered from ill health for a greater part of the time during the last ten years before his death, which occurred February 20, 1910, His wife had died about 1893, and as he had no children his sister kept house for him and took care of him from thence until about 1900, when, on account of the age and failing health of both parties, a niece of John McGinnis x named Ella McCorkle, was sent for to nurse and take care of him. She did so until his death, and in May 1910, filed her claim against the estate of her uncle for the sum of $6633.95 which she claimed was the balance due her from his estate for care and nrusing bestowed upon John McGinnis by her from July 1, 1905 to February 21, 1910, after deducting all credits. A trial was had on this claim before a jury in the Probate court of Peoria County in which the issues were found for the estate. Ella McCorkle thereupon took an appeal from that court to the circuit court of Peoria County, where a trial before a jury resulted in a verdict in her favor in the sum of $1750.00 A motion by plaintiff for a new trial was overruled, judgment was entered upon the verdict and plaintiff below has appealed therefrom to this court. She alleges here that the amount of the verdict in the Court below was grossly inadequate and against the manifest weight of the evidence; that a number of instructions given at the request of appellee were erroneous; and that the court erred in rejecting certain testimony offered by appellant.

Opinion, J.

In this libelous John McGinnis was a resident of Peoria and suffered from ill health for a greater part of the time during the last two years before his death, which occurred on February 20, 1910. His wife had died about 1902, and he had no children. His sister kept house for him and took care of him from then until about 1906, when, on account of the ill health of both parties, a niece of John McGinnis named Ella McCorkle, was sent for to nurse and take care of him. She did so until his death, and in May 1910, filed her claim against the estate of her uncle for the sum of $1000.00 which she claimed was the balance due her from his estate for care and nursing bestowed upon John McGinnis by her from July 1, 1908 to February 21, 1910, after deducting all credits. A trial was had on this claim before a jury in the Peoria county court in which the issues were found for the estate. Ella McCorkle thereupon took an appeal to the circuit court of Peoria County, where a trial before a jury resulted in a verdict in her favor in the sum of $1250.00. A motion by plaintiff for a new trial was overruled, judgment was entered upon the verdict and plaintiff below has appealed therefrom to this court. The alleged [illegible] that the amount of the verdict in the Court below was grossly inadequate and against the manifest weight of the evidence; that a number of instructions given at the request of appellee were erroneous; and that the court erred in refusing certain instructions offered by appellant.

The evidence in the record clearly shows that appellant was engaged in the millinery business in Wyoming, Illinois, prior to 1900 and that she came to work for and take care of John McGinnis in that year because his sister was no longer able to do so. The evidence is also undisputed that she refused to xxxxx stay and perform the services required unless she should receive $25.00 a week therefor, and that he said he would pay her any price she asked.
These facts were testified to by Mary B. Johnson, a sister of John McGinnis. But it appears from the record that when she testified on a former trial she stated that the arrangement was that Mrs. McCorkle was to come and nurse McGinnis and take care of him while Mrs. Johnson did the housework and that appellant was to be paid $25.00 a week for those services "when McGinnis was down sick and could not help himself."
The evidence is conflicting as to how much of the time McGinnis was so sick as to be unable to take care of himself during the last five years of his life. Some witnesses fixed the period of his incapacity at about two years and one half and some at less than that time. The evidence does show however, that during such periods the services necessarily rendered to McGinnis by his nurse were constant, laborious and disagreeable, and we are of the opinion that the sum of $25.00 per week was not excessive for such services. Appellant claims that she should have received a verdict for about $3350.00 being at the rate of $25.00 per week for one half of five years, and that to ask her to accept any less than this amount will work an irreparable injury and injustice to her. We are unable to agree with xxx xxxxxxxxx this contention. The evidence is very conflicting as to the number of weeks during which McGinnis was unable to take care of himself and for which appellant should be paid. In fixing the amount of her damages

The evidence in the record clearly shows that appellant was employed in the military business in Wyoming, Illinois, prior to 1900 and that she came to work for and take care of John McGinnis in that year because his sister was no longer able to do so. The evidence is also undisputed that she returned to xxxxx stay and perform the services required unless she should receive $25.00 a week; therefor, and that he said he would pay her any price she asked.

These facts were testified to by Mary B. Johnson, a sister of John McGinnis. But it appears from the record that when she testified on a former trial she stated that the arrangement was that Mrs. McCorkle was to come and nurse McGinnis and take care of him while Mrs. Johnson did the housework in that appellant was to be paid $25.00 a week for those services "when McGinnis was down sick and could not help himself."

The evidence is conflicting as to how much of the time McGinnis was so sick as to be unable to take care of himself during the last five years of his life. Some witnesses fixed the period of his incapacity at about two years and one half and some at less than that time. The evidence does show however, that during such periods the services necessarily rendered to McGinnis by him nurse were important and indispensable, and we are of the opinion that the sum of $25.00 per week was not excessive for such services. Appellant claims that she should have received a verdict for about $2340.00 ; ing at the rate of $25.00 per week for one half of five years, and that to ask her to accept any less than this amount will work an irreparable injury and injustice to her. We are unable to agree with the contention. The evidence is very conflicting as to the number of weeks during which McGinnis was unable to take care of himself and for which appellant should be paid. In fixing the amount of her damages

at $1750.00 the jury have found that she should be paid at the rate named for seventy weeks or about a year and a half. In view of the conflict in the evidence we do not feel that we can say that the jury should have found that she was entitled to be paid for a greater length of time. Further, the jury may have taken into consideration the fact, or may have inferred from the evidence, as we believe they were justified in doing, that during all of the five years in question appellant received her board and lodging at the expense of John McGinnis, and that her son was also maintained in the same way for at least a portion of that time.

Appellant complains of instructions two to seven both inclusive, given at the request of appellee, as being erroneous in that they assume that Ella McCorkle was a member of the family of John McGinnis during the time she nursed and cared for him and that if "she was merely a member of his family" and was kept and maintained by him without pay, then she could not recover. If these instructions were given without the proper foundation therefor in the evidence, she was not harmed thereby, for the jury by its verdict found that she was not merely a member of the family of John McGinnis, and then proceeded to assess her damages or allow her claim at what they thought was proper under the evidence. We do not consider that the giving of these instructions constitutes an error of which appellant is entitled to complain.

Appellant complains because she was not allowed to testify in rebuttal regarding the visit of John McGinnis to a picnic or soldiers' reunion at Princeville in the fall of 1908, the court having held that she was an incompetent witness under the statute. We do not consider that appellant was harmed in any way by this ruling of the court if she was competent. The incident given about which she desired to testify was not of

great importance, and several witnesses for appellant had already testified, giving it in detail.

We are satisfied that appellant by the verdict of the jury has received approximately all that she is entitled to under the evidence for the services rendered by her to John McGinnis, and that no substantial error was comitted during the trial in the lower court.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appeliate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5958

1211

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 612

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IT REMEMBERED, that afterwards, to-wit: on the 31st day
A. D. 1911, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5958

Anton O. Mathison, appellant.

vs Appeal from Will.

Julia Mathison, appellee

Dibell, J.

On August 15, 1913, Anton O. Mathison filed a bill for divorce from his wife, Julia Mathison, in the circuit court of Will County, in which he alleged that his said wife had wilfully deserted and absented herxself from him on the first day of October, 1907, and had persisted in such desertionup to the time of the filing of the bill of complaint. Service was had and the defendant answered, denying the desertion by her, but alleging that there had been differences between herself and her husband and that he left her on the datte mentioned and has persisted in such desertion. She then filed a cross bill, in which she asked that provision be made for her separate maintenance under the statute on the ground that her husband had sustained improper relations with one Amanda Isaaksen. In this cross bill she alleged that she learned of said alleged improper relations on the first day of October 1907, and ceased marital relations with her husband on that account and never resumed them. Mathison answered this cross bill, denying all its material allegationsm, except the marriage. There was a trial and a decree dismissing the original bill for want of equity and granting Mrs. Mathison separate maintenance, with an allowance for alimony and solicitor's fees. From that decree complainant below appeals.

The parties to this proceeding are Norwegians and lived in Chicago at the time of the trouble between them, and there is evidence in the record tending to show that appellant had caused the title to the house where they lived to be transferred to his wife. In her testimony, appellee based her

On Aug. 15, 1913, Anton O. Mathison filed a bill for divorce from his wife, Julia Mathison, in the circuit court of Will County, in which he alleged that his said wife had wilfully deserted and absented herself from him on the first day of October, 1907, and had persisted in such desertion up to the time of the filing of the bill of complaint. Service was had and the defendant answered, denying the desertion by her, but alleging that there had been differences between herself and her husband and that he left her on the date mentioned and has persisted in such desertion. She then filed a cross bill, in which she asked that provision be made for her separate maintenance under the statute, on the ground that her husband had sustained improper relations with one Amanda Isaacson. In this cross bill she alleged that she learned of said alleged improper relations on the first day of October 1907, and ceased marital relations with her husband on that account and never resumed them. Mathison answered the cross bill, denying all the material allegations, except the marriage. There was a trial and a decree dismissing the original bill for want of equity and granting Mrs. Mathison separate maintenance, with an allowance for alimony and solicitor's fees. From that decree complainant below appeals.

The parties to this proceeding are Norwegians and lived in Chicago at the time of the trouble between them, and there is evidence in the record tending to show that appellant had caused the title to the house where they lived to be transferred to his wife. In her testimony, appellee based her

Cir. Ct. Will

Anton O. Mathison, appellant,

vs. Appeal from Will.

Julia Mathison, appellee

Brentl, J.

withdrawal from her husband upon the finding of a letter which she believed was intended for her husband and which she believed came from Miss Isaaksen. It is evident from an examination of the entire record that said letter was not the cause of her withdrawal from marital cohabitation, as that had taken place some years before she found the letter. Neither was the finding of the letter the real reason for her actually leaving her husband, for she occupied the same house with him for nearly a year after that time. The evidence shows without contradiction that some years before appellee ever heard of Miss Isaaksen, appellee had refused to occupy the same sleeping room with her husband and had withdrawn from cohabitation with him. The reason that she assigned for it was that he went out nights and was occasionally absent for two weeks at a time. In reply to this allegation, appellant testified that he was never absent from home for any period of time, except for about one week which he spent at the St Louis Exposition in 1904 with a Mr. Leahof a friend and also except for the space of two months, which he spent in a visit to his dying mother in Norway. There is no evidence that his going on either of these trips was disapproved by his wife Finally about a year after the finding of the letter mentioned above, appellee sold their home and all the furniture, not even allowing appellant to retain a bed in which to sleep, took all the proceeds of such sales to herself and then left her husband entirely, going to board and live with a family of her acquaintance. Appellant was a skilled mechanic and had erected a shop in the rear of the house in which they lived, and after his wife sold the property, she began proceedings against her husband to eject him from the premises and did eject him and he was forced to find another location for his shop. Thereafter he made his home, or at least he

from her husband upon the finding of a letter which she believed was intended for her husband and which she believed came from Miss Isaakson. It is evident from an examination of the entire record that said letter was not the cause of her withdrawal from marital cohabitation, as that had taken place some years before she found the letter. Neither was the finding of the letter the real or reasonable cause for appellee leaving her husband, for she occupied the same house with him for nearly a year after that time. The evidence shows without contradiction that some years before appellee ever heard of Miss Isaakson, appellee had refused to occupy the same sleeping room with her husband and had withdrawn from cohabitation with him. The reason that she assigned for it was that he went out nights and was accustomarily absent for two weeks at a time. In reply to this allegation, appellant testified that he was never absent from home for any period of time, except for about three weeks at the time he made a visit to his dying mother in Norway. There is no evidence that his going on either of these trips was disapproved by his wife. Finally about a year after the finding of the letter mentioned above, appellee sold their home and all the furniture, not even allowing appellant to retain a bed in which to sleep, took all the proceeds of such sales to herself and left for parts unknown, refusing to have anything to do with appellant or any of her relatives. Appellant was a civil engineer and had erected a shop in the rear of the house in which they lived, and after his wife sold the property, she began procuring eviction against her husband to eject him from the premises and did eject him and he was forced to find another location for his shop. Thereafter he made his home, or at least he

ate and slept, in many different places, at one time living in the boarding or rooming house maintained by Miss. Isaaksen and her mother. There is proof that appellant performed some minor services about the house when he was boarding in the house of Miss. Isaaksen, such as carrying coal at a time when she was disabled because of a fall, and that on several occasions he accompanied Miss. Isaacsen to Norwegian picnics or sumilar gatherings. There is however, nothing in the record that would justify any conclusion of immoral relations between appellant and Miss Isaacsen. Practically the entire case of appellee on that point is made to rest upon a letter, partly in Norwegian and partly in English which appellee claims to have found on her kitchen table. Although several of appellees witnesses knew Miss. Isaaksen for several years prior to the trial of this cause, no attempt was made to prove the handwriting of this letter. The letter was as follows:
"Dear Friend: Have received the articles sent all right. Can you send me some fruit, oranges, grapes and apples? Send me also two bottles of the same kind of wine I got last year, the last time you sent, It is best to order from some big place so you can have it sent. A five dollarbill would also be acceptable. Yours, A. 816 Washtenaw avenue. When you go down town buy me some good ink for the fountain pen; you could go up in that place where it is bought and ask what kind of ink it is the best and get a filler, I lost mine."
On the margin was written this: "You must surely not come with these things yourself, nor come anywhere near the house."
Appellee testified that she showed this letter to her husband and that he admitted that it belonged to him and said that he would do as he pleased in the matter. Appellant denied that he ever saw the letter until it was produced at the trial or that he ever had it or that he ever admitted

it to be his. There is no other evidence in the record as to this letter and apparently appellant is entitled to as much credence as his wife. Her statements in regard to it are not corroborated in any way and she cannot be said to have established her case with regard to the letter by any preponderance of the evidence. Furthermore, even if this letter had actually been written to appellant by Miss. Isaaksen, we cannot regard it in itself as sufficient evidence of the existence of improper relations to justify appellee in leaving her husband or the granting to her of separate maintenance.

The proof clearly shows that when appellee lived with her husband she was a good housekeeper and kept their home clean, but that she was harsh to her husband and severe with him, while he was pleasant with her; that she was very harsh to their little girl, who afterwards died, and was jealous of her husband because appellant and the child had much affection for each other. The evidence warrants the conclusion that she led her husband a very hard life, Before the separation appellant met with an accident in which he lost an eye. Appellee did not care for him or render him any help at that time, but left his care to his working associates who took turns sitting up with him at night and bathing and treating his injury. She went to his associates in the lodge immediately after the accident in an attempt to have the lodge send him to the hospital, that she might not have the care of him. It is plainly obvious from the evidence that appellee had no regard for her husband and had had none for many years before she finally left him.

Upon every material allegation of the original bill appellant is confirmed by the evidence. His wife did withdraw from him for several years and did finally sell

out the home and its contents and cease to live xxxx hi in the same house with him. Her only excuse for so doing and the sole reason on which she seeks separate maintenance is, in our judgment, not established by the evidence. In fact, on numerous collateral matters appellee's testimony is strongly contradicted. From a careful examination of this case, we conclude that the appellant was clearly entitled to a divorce and that ther was no preponderance of evidence to justify appellee in having separate maintenance. Appellee has money in the bank or loaned out on mortgage security, which money was obtained by her by the sale of the home and all its furniture, while appellant has practically nothing except his machin ry, and he is partially disabled by the loss of one eye and has no home.

The decree of the court below is therefore reversed and the cause remanded, with directions to dismiss the cross bill for want of equity and to grant a divorce to appellant on the ground of desertion.

Reversed and remanded with directions.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5961

1213

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

5961

Gen. No. 5961

The People ex rel, etc. appellee

vs Appeal from Kankakee.

Gertie Clark, appellant.

Dibell, J.

On July 10, 1913, the People, on the relation of the States Attorney of Kankakee County filed a bill in equity against Gertie Clark and Nellie Clark and others, in which it was charged that Nellie Clark owned certain real estate therein described, located in or near the city of Kankakee, and that Gertie Clark, daughter of Nellie Clark was conducting thereon a house of ill fame. The bill contained full allegations of facts in detail, showing that Gertie Clark was so conducting such a house at that place. It also charged that shortly prior to the filing of said bill she had been arrested, charged with keeping such a house, and had pleaded guilty to the charge and had been punished therefor, but that she continued to keep said place for the practice of prostitution; and there were sufficient allegations of public injury therefrom and that the same was a public nuisance. The bill prayed for an injunction, restraining thex keeping of said house of ill fame. The bill was not sworn to by the states attorney but was accompanied by the affidavits of several persons who lived in the immediate vicinity of said house, wherein each affiant stated in detail what he or she had seen at said place, and from which states of fact the inference was irresistible that Gertie Clark conducted a house of ill fame at said place. A temporary injunction was granted and was served upon Gertie Clark and Nellie Clark on July 12, 1913. Thereafter on July 23nd. the States Attorney filed a petition or information for an attachment against said Gertie Clark and Nellie Clark for

Dec. 2, 1913

The People ex rel, etc. Appellee

vs Appeal from Kankakee.

Gertie Clark, Appellant.

Mr. Presiding Justice Dibell delivered the opinion of the court.

On July 10, 1913, the People, on the relation of the State's Attorney of Kankakee County filed a bill in equity against Gertie Clark and Nellie Clark and others, in which it was charged that Nellie Clark owned certain real estate therein described, located in or near the city of Kankakee, and that Gertie Clark, daughter of Nellie Clark, was conducting thereon a house of ill fame. The bill contained full allegations of facts in detail, showing that Gertie Clark was so conducting such a house at that place. It also charged that shortly prior to the filing of said bill she had been arrested, charged with keeping such a house, and had pleaded guilty to the charge and had been punished therefor, but that she continued to keep said place for the practice of prostitution; and there were sufficient allegations of public injury therefrom and that he mere was a public nuisance. The bill prayed for an injunction, restraining then keeping of said house of ill fame. The bill was not sworn to by the state's attorney but was accompanied by the affidavits of several persons who lived in the immediate vicinity of said house, whereby each affiant stated in detail what he or she had seen at said place, and from which statue of fact the influence was irresistible that Gertie Clark conducted a house of ill fame at said place. A temporary injunction was granted and was served upon Gertie Clark and Nellie Clark on July 12, 1913. Thereafter on July 22nd, the State's Attorney filed a petition or information for an attachment against said Gertie Clark and Nellie Clark

contempt of court in keeping a house of ill fame upon said premises in violation of said injunction. Said petition was accompanied by several affidavits of persons living in the immediate vicinity of the house. An attachment was issued for Gertie Clark and Nellie Clark and they were brought into court and were admitted to bail. Afterwards the petition for contempt was dismissed as to Nellie Clark. On July 24th, the charge of contempt against Gertie Clark was heard. She was ruled to file a verified answer to the information instanter and made default. The court, by an order then entered, found that it had jurisdiction of the subject matter of the cause and of the person of the defendant, and recited that the cause was heard upon the affidavits and petitions and information filed therein by the complainant; and it found that Gertie Clark had wilfully disobeyed the injunction by thereafter using the premises for the purpose of conducting a house of ill fame and a place for the practice of prostitution and lewdness. She was adjudged guilty of wilful contempt of court, and sentenced to imprisonment in the county jail for forty five days and fined $300 and costs, and ordered committed to the county jail till fine and costs were paid or she was otherwise discharged by due process of law. On September 3, 1913, she moved to dissolve the temporary injunction and said motion was afterward heard and denied. Said defendant made two separate prayers of appeal to this court, one from the order refusing to dissolve the injunction and the other from the order adjudging her guilty of contempt of court, both of which prayers were granted, but her appeal bond is limited to an appeal from the sentence for contempt of court.

This case is, in all respects except one, similar in principle to Nos. 5959 and 5960, the People v Nellie Clark, in which we file an opinion this day, and to which we refer for a decision of the questions involved. It relates to a

house of ill fame kept at another location.

The court below signed a certificate of evidence which recited that upon the hearing of the motion to dissolve the injunction and also upon thehearing of the proceedings against Certie Clark for contempt, it was stipulated between the counsel for the respective parties that the notary public before whom one of the affidavits attached to the bill of complaint was sworn was a solicitor for the complainant, and the certificate recited that this was all the evidence offered upon the hearing of said cases. It is contended that the court heard no evidence that Certie Clark had violated the injunction, and that, without such evidence, she could not be convicted. As before stated, the order convicting and punishing her for contempt recited that the cause was heard upon the affidavits and petitions filed by the people thereon. If these affidavits were not heard it would have been unnecessary to show that the solicitor for the complainant was the notary public before whom one of the affidavits was taken; and the more reasonable interpretation of the certificate of evidence is that said stipulation was all the evidence heard, except that recited in the order of the court. It does not seem that it could have been intended by the court to contradict the recital in the order. Said affidavits clearly showed that Certie Clark continned a house of ill fame at said place after she was served with the injunction. But, further, this was a chancery proceeding, and the petition or information called for upon Certie Clark for an answer and did not waive the oath. She was therefore called upon to answer it under oath. She was also ruled to file a verified answer. She did not do so but was defaulted and the averments of the petition were taken and confessed. If she thought she had a right to file an un-

verified answer, she did not ask leave to do so. One against whom a decree by default is entered cannot question the sufficiency of the evidence to support it. Monarch Brewing Company v Wolford, 179 Ill. 258. The order is therefore affirmed.

Order affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5886

216

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5886

The People of the State of Illinois.

appellee

vs Appeal from Kankakee.

Joseph Richardson, (Levi Richardson, appellant.)

Whitney, J.

This is an action against the surety on a bail bond given by the principal in the same on a charge of rape on an examination ~~for the charge of rape~~ by a police magistrate. This bond was given on October 15, 1912, and required the appearance of the accused at the next term of the circuit court of the county of Kankakee to be held on the 6th. day of June 1912, instead of 1913. It is contended that the bond is a nullity because of this mistake in the date and that no recovery can be had thereon. There is nothing in this contention as the bond required the appearance of the accused on the first day of the next term of the circuit court etc. This was sufficient and the insertion of the date may be regarded as surplusage. The parties who signed the bond were bound to know, at their peril, the first day of the next term of the circuit court of Kankakee County.

Section 311 of the Criminal Code seems to be conclusive on the parties who signed the bond for the bond recited when the accused was to appear, namely on the first day of the next term of the circuit court; it clearly appearing that the police magistrate who took the bond was authorized by law so to do.

It is next urged that the police magistrate had no jurisdiction to hold the examination or take the bond, as we understand the point raised. By ref rence to the Constitution it says, (Art. 6, P. 21)" Justices of the Peace,

Cons. No. 1918

The People of the State of Illinois,

vs

Joseph Schwartzman, Chas.
Brandeis, appellant.)

Petitioner, Pro

This is an action against the surety on a bail bond given by the principal in the municipal court of Chicago on October 15, 1918, and required the appearance of the defendant at the next term of the circuit court of the county of Cook to be held on the 8th. day of June 1919, instead of 1918. It is contended that the bond is a nullity because of this mistake in the date and that no recovery can be had thereon. There something in this contention, however, the appearance of the accused on the first day of the next term of the circuit court etc. This was sufficient and the discretion of the date may be regarded as surplusage. The parties who signed this bond were bound to know, at their peril, the first day of the next term of the circuit court of Winnebago County.

Section 317 of the Criminal Code seems to be conclusive on the parties who signed the bond for the bond recited that the accused was to appear, namely on the first day of the next term of the circuit court; it clearly appearing that the police magistrate who took the bond was authorized by law to do so. It is so.

It is next urged that the police magistrate had no jurisdiction to hold the examination or take the bond, as we understand the point raised. By reference to the

police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform." It is reasonable to suppose that the framers of the Constitution used the word "uniform" in its usual and ordinary sense. By reference to Webster's dictionary it is found "uniform" means, (1) of the same form with others; (2) agreeing with each other; (3) conforming to one rule or motion. It seems reasonable that if two courts have the same jurisdiction, they have concurrent jurisdiction, so that where one has jurisdiction the other has jurisdiction and we are not cited to any authority that holds differently. The constitutional authority for the existence of justices of the peace and police magistrates has been cited to show that the constitution must be looked to as the source of the jurisdiction of either. Justices of the peace and police magistrates are to be elected from such districts as are or may be provided by law.

The legislature has enacted, Page 192, Chapter 34, Revised Statutes, "there may be a police magistrate elected at a regular election from each village, who shall give bond, qualify and have the same jurisdiction as other justices of the peace etc." And by act of the legislature passed and in force April 13, 1875, it is provided that all cities in the state may elect a police magistrate to have the same jurisdiction that police magistrates of villages have under the general law for the incorporation of cities and villages. We hold that by the constitution of the state the jurisdiction of a justice of the peace and police magistrate must be uniform and that any act of the legislature attempting to make a difference in their

jurisdiction would be bad, at least in so far as it provides a different jurisdiction.

Appellant would hardly contend that a justice of the peace does not have jurisdiction in preliminary examinations on the charge of rape and jurisdiction to take the bail bond if the accused were held to bail.

If as we have attempted to show police magistrates have the same jurisdiction, then the papers signed by him as police magistrate would be good.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5911

1217

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5911.

Jefferson J. Green,

Defendant in error.

vs Error to Peoria.

Anna E. Schwing,

Plaintiff in error.

Whitney J.

Defendant in error sued plaintiff in error and Her husband in assumpsit and attachment and gave bond and levied his attachment writ. A defense was interposed by traversing the case for the attachment and on that issue verdict was rendered for plaintiff in error. There was a judgment for defendant in error however in assumpsit for the amount due him and this is a scire facias sued out by defendant in error to revive that judgment. Pleas were interposed to the scire facias as follows, (1) nnl tiel record; (2) release of the judgment for value; (3) payment of the judgment. On these three pleas issues were joined. There was a fourth plea to which a demurrer was sustained and leave given to file an additional plea, which is not a fourth plea although so styled in the abstract of the record. This additional plea alleged an agreement between ~~defendant~~ Green and ~~plaintiff~~ Schwing and one Hall, and that Green before signing this agreement demanded a release of his liability on the attachment bond and then that an addition was made to the agreement to that effect and Green signed it. The plea averred that the shares of stock mentioned in the contract were set off to Schwing and placed in a bank for securit y, and that Green assigned his judgment to said Hall and that the assignment is in full force and effect and that the judgment has never been reassigned to Green and that he has no interest or title in the judgment. To this plea there

was a replication denying that defendant Green had assigned the judgment. On a jury trial defendant Green introduced the judgment and evidence that it had not been paid. Plaintiff Schwing offered the contract which was objected to and the court sustained the objection, and certain questions were asked of plaintiff Schwing as to what had been done under the contract. This was objected to and the court sustained the objection, but offered to permit plaintiff in error to show payment if he could, but plaintiff in error did not offer any proof of payment. There was a verdict and judgment for defendant in error which was orally directed by the court but no point is made in the motion for a new trial on the effect of the oral direction of the court. The real question is whether the contract offered in evidence showed any defense and whether the court erred in sustaining the objection to it going in evidence. The replication to the additional plea was that the judgment had not been assigned. The burden to prove it had been assigned was upon plaintiff in error who averred it in the plea that it had been assigned. There was no proof that it had been assigned outside of the terms of the contract. By that contract defendant in error agreed to assign the judgment to Hall but there was no proof offered that he did so. Even if proof had been offered to that effect it would constitute no defense. If the assignee desired to sue, he would sue in the name of defendant in error for the use of assignee and assignee's name need not appear in the proceeding. (Union Nat'l. Bank of Chicago v Barth, 179 Ill. 83; Knight v Griffey, 161 Ill. 85.)

The contract in no way constituted a release of the judgment. It provided that plaintiff in error should place certain stock in a certain corporation in the hands of one

certain stock in a certain corporation in the hands of one judgment. It provided that plaintiff in error should place

The contract in no way constituted a release of the

[illegible] proceeding. (Union Nat'l. Bank of Chicago v Barth, 130 Ill. 85; Knight v Dudley, 161 Ill. 85.)

[illegible] Boarding offered the contract which was objected [illegible] the court sustained the objection, and certain [illegible] were asked of [illegible] Boarding as to what had been done under the contract. This was objected to and the court sustained the objection, but offered to permit plaintiff in error to show payment [illegible], but plaintiff in error did not offer any proof of payment. There was a verdict and judgment for defendant in error which was [illegible] [illegible] [illegible] [illegible] [illegible] tion for a new trial on the effect of the oral direction of the court. The real question is whether the contract [illegible] [illegible] [illegible] [illegible] [illegible] ered in evidence. The objection to it going in evidence. The replication to the additional plea was that [illegible] had not been assigned. The burden to prove it had been assigned was upon plaintiff in error who averred it in the plea that it had been assigned. There was no proof that it had been assigned outside of the terms of the contract. By that contract defendant in error agreed to assign the judgment to Hull but there was no proof offered that he did so. Even if proof had been offered to that effect it would constitute no defense. If the assignee desired to use, he would sue in the name of defendant in error for the use of assignee and assignee's name need not appear in the proceeding. (Union Nat'l. Bank of Chicago v Barth, 130 Ill. 85; Knight v Dudley, 161 Ill. 85.)

The contract in no way constituted a release of the judgment. It provided that plaintiff in error should place certain stock in a certain corporation in the hands of one

Hall and that plaintiff in error should devote his time to the interests of said corporation, and that defendant in error should assign his judgment to said Hall and that when said Hall received the money as the proceeds of the stock he should first apply $10000.00 to his own account and then should pay the judgment. In the contract it is also provided plaintiff in error could pay the judgment outside of the stock. There was no offer to prove that the money had been released by Hall and paid to defendant in error but only that plaintiff in error acted under the contract, whatever that may mean. No defense was interposed. The verdict and judgment were right and the judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5919

1218

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5919.

Swan Carlson, appellee

vs Appeal from DeKalb.

Chicago Great Western R. R. Co.

appellant.

Whitney. J.

Appellee was a farmer living near three railroads ~~The tracks of~~ two of them, the appellant company and the Chicago & Northwestern Railway Company ~~was~~ were perhaps sixty rods west of his buildings and the other one a little further to the east. The railroad that was at the greatest distance from his building was that of appellant and intervening between appellant's railroad and the buildings of appellee was the ~~main~~ line of the Chicago & Northwestern Railway Company.

On April 30, 1909 appellee turned a mare and colt out of the barn to go to the watering place in the yard. The gate leading to the highway from the yard was open. Half an hour later appellee went to look for the mare and colt and found the gate open and found them down near appellant's railroad A train had gone over appellants railroad and had struck and killed the animals. One witness had seen the mare and colt alive some distance east of the two roads, appellants railroad and the Chicago & Northwestern Railroad. Another witness had seen them a little ways west of appellant's railroad in a ditch on the north side of the highway crossing. Appellee sued the railway company to recover the value of these animals and filed a declaration of two counts, the first alleging failure to give the statutory signals of ringing the bell or sounding the whistle, and the second count alleging negligent operation of the train. Some of the witnesses didnot hear any bell ringing, but we regard it as clearly proven that an automatic bell was ringing.

Opn. No. 2019.

Dean Carlson, appellee

vs Appeal from DeKalb.

Chicago Great Western R. Co.

appellant.

Petitioner, J.

Appellee was a farmer living near three railroads, two of them, the car plant company and the Chicago & Northwestern Railway Company perhaps eighty rods west of his buildings and the other one a little further to the west. The railroad that was at the greatest distance from his building was that of appellant and intervening between appellant's railroad and the buildings of appellee was the main line of the Chicago & Northwestern Railway Company.

On April 30, 1909 appellee turned a mare and colt out of the barn to go to the watering place in the yard. The gate leading to the highway from the yard was open. Half an hour later appellee went to look for the mare and colt and found the gate open and found them down near appellant's railroad A train had gone over appellants railroad and had struck and killed the animals. One witness had seen the mare and colt give some distance east of the two roads, appellants railroad and the Chicago & Northwestern Railroad. Another witness had seen them a little ways west of appellant's railroad in a ditch on the north side of the highway crossing. Appellee sued the railway company to recover the value of these animals and filed a declaration of two counts, the first alleging failure to use the statutory signals of ringing the bell or sounding the whistle, and the second count alleging negligent operation of the train. Some of the witnesses didnot hear any bell ringing, but we regard it as clearly proven that an automatic bell was ringing.

The engineer died before the trial. The fireman in charge of the engine did not see the animals before they were struck. There is no proof in this record of the train being wilfully and wantonly run into the animals, and indeed such proof would not be proper under the declaration filed in this case. It is just as consistent with the evidence that this mare and colt rushed on the track from the ditch on the north side of the highway just ahead of the train as to believe anything else, and that they did so because of being frightened by the train. There is no evidence in the record that the engineer saw the animals in time to stop the train and avoid the accident. It is agreed by counsel in their brief that this case involves only a question of fact, therefore there is no question of law involved. We cannot find the question of fact in favor of appellee's judgment, and it should be reversed with a finding of fact, that the killing of the animals was not due to any negligence of appellant as charged in the declaration.

Judgment reversed ~~without remanding~~ with.

Finding of Facts.

We find as a matter of fact that the killing of the animals, mentioned in the declaration, was not due to an y negligence of appellant, charged in the declaration.

Finding of Facts.

negligence of appellant, charged in the declaration.

We find as a matter of fact that the killing of the animals, mentioned in the declaration, was not due to any

Finding of Facts.

Judgment reversed without remandment.

tation.

to any negligence of appellant as charged in the declara-

finding of fact, that the killing of the animals was not due

of appellee's judgment, and it should be reversed with a

law involved. We cannot find the question of fact in favor

only a question of fact, therefore there is no question of

agreed in counsel in their brief that this case involves

in time to stop the train and avoid the accident. It is

evidence in the record that the engineer saw the animals

as because of being frightened by the train. There is no

the train as to believe anything else, and that they did

the road on the north side of the highway just ahead of

plaintiff in this case. It is just as consistent with the

indeed such proof would not be proper under the declaration

The engineer died before the trial. The fireman in charge

of the engine did not see the animals before they were

struck. There is no proof in the record of the train

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5934

1220

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 640

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5934.

Joseph T. Ryerson & Son, appellee

vs Appeal from LaSalle.

Crawford Locomotive & Car Co.

appellant.

Whitney, J.

Appellee, Joseph T. Ryerson & Son, sued appellant Crawford Locomotive and Car Company in assumpsit and filed a declaration containing the common counts only with an affidavit of the amount due and a copy of the account sued on. Appellant filed a plea denying service and appellee took out an alias summons to the next term and had service of it. Appellant, by its attorney entered its special appearance at that term and made a motion to continue the case because no copy of the account sued on was filed with the declaration, which was denied. At a later date a default was entered against appellant and proofs were heard and the damages assessed in the amount named in the affidavit filed with the declaration and there was a judgment against appellant therefor. The next day appellant appeared and prayed an appeal which was granted. It is contended by appellant it was entitled to a continuance because appellee did not file with his declaration a copy of the account sued on and that it was error to default appellant without first entering a rule on him to plead; that it was error to allow a default without notice to appellant of the time and place of hearing the motion; that it was error to assess damages against appellant without notice to appellant of the time and place of such assessment; that it was error to render judgment against appellant without first striking its motion for a continuance from the files

No. 8884.

Thomas T. Peterson & Son, appellee

vs

Appeal from DeKalb.

Chesford Locomotive & Car Co.

appellant.

Appellee, Thomas T. Peterson & Son, sued appellant Chesford Locomotive and Car Company in assumpsit and filed a declaration containing the common counts only with an affidavit of the amount due and a copy of the account sued on. Appellant filed a plea denying service and appellee took out an alias summons to the next term and had service of it. Appellant, by its attorney entered its special appearance at that term and made a motion to continue the cause because no copy of the account sued on was filed with the declaration, which was denied. At a later date a default was entered against appellant and proofs were heard and the damages assessed in the amount named in the affidavit filed with the declaration and there was a judgment against appellant therefor. The next day appellant appeared and prayed an appeal which was granted. It is contended by appellant it was entitled to a continuance because appellee did not file with his declaration a copy of the account sued on and that it was error to default appellant without first entering a rule on him to plead; that it was error to allow a default without notice to appellant of the time and place of hearing the motion; that it was error to assess damages against appellant without notice to appellant of the time and place of such assessment; that appellee did not prove [illegible] affidavit for the amount due [illegible] appellant filed a motion for a continuance from the time

and that it was error to enter judgment where it does not appear that any evidence was heard.

With the declaration was filed a copy of the account sued on showing appellant indebted to appellee for goods wares and merchandise sold and delivered $15000.00 and so on with various other items. This was a sufficient copy of the account sued on to satisfy the statute and a motinn for continuance on the ground no copy of the account sued on was filed was properly overruled. (Chicago Stamping Co. v Mechanical Rubber Co. 83 Ill. App. 230.)

If appellant was not satisfied with this copy of the account sued on it was incumbent upon himto move for a bill of particulars, or a more specific account, but in addition to this copy of the account there was filed an itemized statement giving dates and amounts due from appellant to appellee, amounting in all to the amount of the judgment finally rendered; and also there was filed with the declaration an affidavit of the amount due, substantially in conformity with the statute, so there were two copies of the account sued on attached to the declaration instead of none. It is contended they are contradictory in amount, but the judgment was for the lesser amount so that appellant cannot complain on account of that contradiction. If there are any rules of court governing the question of pleading, such rules are not shown in the record, therefore we assume there are none.

In the absence of a rule of court to the contrary, one who is in court by service of process or appearance is bound to take notice of all subsequent action on the part of the court. Domestic Bldg. Assn. v Nelson, et al 173 Ill. 386.)

and that it was error to enter judgment where it does not appear that any evidence was heard.

With the declaration was filed a copy of the account sued on showing appellant indebted to appellee for goods sold and delivered in the amount of $13000.00 and to ~~on~~ with various other items. This was a sufficient copy of the account sued on to satisfy the statute and a motion for ~~a~~ continuance on the ground no copy of the account sued on was filed was properly overruled. (Chicago Pneumatic Tool Co. v Mechanical Rubber Co, 83 Ill. App. 530.)

If appellant was not satisfied with this copy of the account sued on it was incumbent upon him to move for a bill of ~~xxxxxx~~ particulars, or a more specific account, but in addition to this copy of the account ~~xxx~~ there was filed an itemized statement giving dates and amounts due from appellant to appellee, amounting in all to the amount in the judgment finally rendered; and also there was filed with the declaration an affidavit of the amount due, substantially in accordance with the statute, as there was two ~~xxxxxx~~ copies of the account sued on attached to the declaration instead of none. It is contended ~~xxxx~~ they are contradictory in amount, but the judgment was for ~~the~~ lesser amount so that appellant as not complain on account of that contradiction. If there are any rules of court governing the question of pleading, such rules are not shown in the record, therefore we presume there are none.

In the absence of a rule of court to the contrary, one who is in court by service of process or appearance is bound to take notice of all subsequent action on the part of the court. Domestic Bldg. Assn. v Wilson, ~~xxxx~~ 178 Ill. 386.)

The default was not entered in this case until the tenth day of the term. There is nothing in the point made by appellant that he was entitled to a notice of the hearing of the motion for default. The cases cited by appellant are all cases in which there was a rule of court providing for notice. Such is not the law in any jurisdiction in this state where there are no rules of court on the subject of notice. (In the absence of a tule governing the question of pleading the giving of time to plead is a matter of discretion with the court. Culver v Hide & Leather Bank of Chicago, 78 Ill. 635; Cozzens v Chicago Hydraulic Pressed Brick Co. x 166 Ill. 213; Ruppe Jr. v Glos, 251 Ill. 80.)

The motion to continue the case having beenpassed on by the court it was not also necessary to strike the motion from the files and it would have been improper to do so . The statute makes the affidavit of the amount due on the claim, evidence in the case. The record does not show that the court considered that affidavit on the hearing. There was error caused by the clerk in entering up the judgment. Instead of writing up a judgment for want of plea, the judgment was for want of appearance. There was an appearance on file. (This was irregular but not reversible error. Plaff v The Pacific Express Co. 251. Ill. 243.

The bill of exceptions in this case shows that appellant appeared by its attorney before it was defaulted and preserved an exception. If the entering of this judgment was irregular it was the duty of appellant, by its attorney, when it came into court next day as appears by the record and during the same term of court to have moved to set aside the judgment instead of taking an appeal, and

if it had a meritorious defense it should have filed an affidavit showing that fact.

It is entirely clear from this record that appellant had had no meritorious defense and in taking this appeal is merely seeking a delay. The judgment of the trial court will be affirmed and a judgment here rendered for damages for $400.00 ~~per cent of the judgment below~~.

Hudgment affirmed, with $400. damages

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5949

1221

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 642

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5949

Kendrick E. Bills, appellee

vs Appeal from Whiteside.

Arthur B. Cooling, appellant.

Whiteside. J.

Arthur B. Cooling, appellant, rented and occupied a building of Kendrick E. Bills, appellee, under a three years written lease at a stipulated rental payable monthly. He held over eight months of the fourth year and then vacated the premises. This action was brought at the end of the fourth year to recover four months rent for the time after he moved out. There was a judgment for appellee on the theory that appellant had become a tenant from year to year and that when he held over into the fourth year he became liable for the whole years rent. This appeal is prosecuted from that judgment.

The defense in the court below was that appellant made some arrangement with appellee before the termination of his written lease by which he was to hold over as a tenant from month to month; also that at about the time he vacated at the end of the eight months holding over, he made some arrangement with appellee that he should be released from liability on his helping appellee to get another tenant. Each of these defenses rests on the testimony of appellant and contradicted by appellee, thus leaving the question to the jury as to the facts and the jury having found for appelleethere is no reason for disturbing their verdict unless there was material error of law. Error is assigned on the giving of instructions but we fail to see any error therein.

The law as applicable to the facts in this case as the jury found them to be stated in Clinton Wire Cloth Co.

Dec. No. 3840

Kendrick E. Hills, appellee

vs Appeal from Whiteside.

Arthur B. Cooling, appellant.

Whiteside. ?

Arthur B. Cooling, appellant, rented and occupied a building of Kendrick E. Hills, appellee, under a three years written lease at a stipulated rental payable monthly. He held over eight months of the fourth year and then vacated the premises. This action was brought at the end of the fourth year to recover four months rent for the time after he moved out. There was a judgment for appellee on that theory that appellant had become a tenant from year to year and was to hold over into the fourth year liable for the whole years rent. This appeal is prosecuted from that judgment.

The defense in the court below was that appellant made some arrangement with appellee before the termination of his written lease by which he was to hold over as a tenant from month to month also that at about the time he vacated at the end of the eight months holding over, he made some arrangement with appellee that he should be released from liability on his holding appellee to get another tenant. Each of these defenses rests on the testimony of appellant and contradicted by appellee, thus leaving the question as the jury as to the facts and the jury having found for appelleethere is no reason for disturbing their verdict unless there was material error of law. There is alleged on the giving of instructions but we fail to see any error therein.

The law as applicable to the facts in this case as the jury found them to be stated in Clinton Wire Cloth Co.

v Gardner 99 Ill. 151, which case has been repeatedly affirmed in a great number of cases following that case and in which that case is cited, too numerous to be detailed here.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5952

1022

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

187 I.A. 643

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IT REMEMBERED, that afterwards, namely: on the 31st day
, A. D. 1914, the opinion of the Court was filed in
office of said Court, in the words and figures

Gen. No. 5952.

Harry G. Thomas, appellee

vs Appeal from Whiteside.

Addison J. Platt, Mayor &c.

appellant.

Whitney, J.

Harry G. Thomas, appellee, presented a bill to the city council of the city of Sterling for electrical services from May 1st. to October 1st. 1913 for $62.50 or at the rate of $12.50 per month. This bill was finally settled by compromise between appellee and said city council at $50. and the council unanimously voted him that sum, all alderman being present. A warrant was made out on the proper fund and signed by the proper clerk, but appellant as mayor refused to sign the warrant and as appellee could not draw the money without the signature of the mayor, he filed this petition for a writ of peremptory mandamus to compel the mayor to sign the warrant. Appellant demurred to the petition but before the court had acted on that demurrer, appellant filed his answer to the petition. The filing of the answer operated in law as a waiver of the demurrer. Appellee demurred to the answer and the demurrer was sustained. Appellant elected to abide by his answer and a writ of peremptory mandamus was ordered and hebrings the case to this court by appeal. The answer of appellant admits that he requested appellee to render a bill for his services. The demurrer was properly sustained to the answer. Many things in the answer are admitted and as to many things it is evasive. The answer admitted the city was organized under the general law and had a fire alarm system, with signals operated by electricity and that appellee had kept said system in repair for the preceding two years, and the

Cur. Ad. 1908.

Harry C. Thomas, appellee

vs Appeal from Whiteside.

Adrian J. Platt, Mayor &c.

appellant.

Mr. Justice [illegible]

Harry C. Thomas, appellee, presented a bill to the city council of the city of Sterling for electrical service from May 1st, to October 1st, 1913 for $90.00 at the rate of $12.50 per month. This bill was finally settled by compromise between appellee and said city council at $80. But the council expressly stated that they did not admit liability, but were willing to settle the matter for the sum of $80. Appellant refused to sign the warrant and he appellee could not draw the money without the signature of the mayor, he filed his petition for a writ of peremptory mandamus to compel the mayor to sign the warrant. Appellant demurred to the petition but before the court had acted on that demurrer, appellant filed his answer to the petition. The filing of the answer operated in law as a waiver of the demurrer. Appellee demurred to the answer and the demurrer was sustained. Appellant elected to abide by his answer and a writ of peremptory mandamus was ordered and perfects the case to this court by appeal. The answer of appellant admits that he requested appellee to render a bill for his services. The demurrer was properly sustained to the answer. Many things in the answer are admitted and as to many things it is evasive. The answer admitted the city was organized under the general law and had a fire alarm system, with signals operated by electricity and that appellee had kept said system in repair for the preceding two years, and the

answer did not deny he rendered services for the first five months in question, but alleged it was not at the request of the chairman of the committee. The answer admits appellant asked for a bill and a bill was presented. The answer also admits the council audited the bill for the Fifty Dollars and allowed it that and a warrant was drawn and that he refused to sign it. We can infer appellant apparently puts his refusal to sign the warrant on the ground that there was no valid contract for the service. It nowhere appears from the record that the services were not worth all that the city voted to pay.

The judgment of the court below should be affirmed under the rule stated in Fredericks &c. mayor v People ex rel, &c. 83 Ill. App. 89.

The services were rendered to the city by one who had theretofore been regularly paid by the council for the same services, and the city, if it accepted the services, would be bound to pay for what it did receive, even though it would not be compelled to continue appellee in its service. The council having agreed upon $50.00 as ax a reasonable compensation, and the answer practically admitting that he was to have a quantum meruit compensation, we are of the opinion it was the duty of the mayor to sign the warrant.

Judgment affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

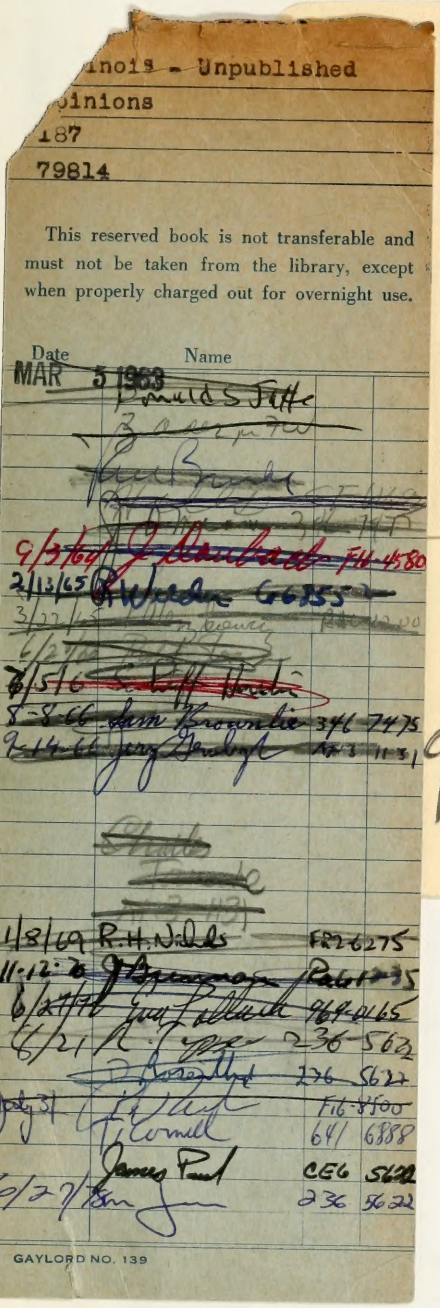
inois - Unpublished
inions
187
79814

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Date | Name

MAR 5 1963 Arnold S Jaffe
9/3/64 J Lambert FH 4-80
2/13/65 R Wheeler 66855
8-8-66 Sam Broomlie 346 7475
9-14-66 Jerry Grubyk AP3 1131
11/8/69 R H Nichols FR2-6275

79814



inois - Unpublished
pinions
187
79814

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Date | Name

MAR 5 1963 Donald S Jaffe

9/3/64 J Blanchard FH-4580

2/13/65 R Weeden 66355

8-8-66 Jean Krouble 376 7475

9-14-66 Jerry Dudzik

1/8/69 R.H. Nibbs FB26275

11-12-6 J Brennan

6/21 [illegible] 236 5622

6/21 [illegible] 236 5622

July 31 [illegible] FI6-8500

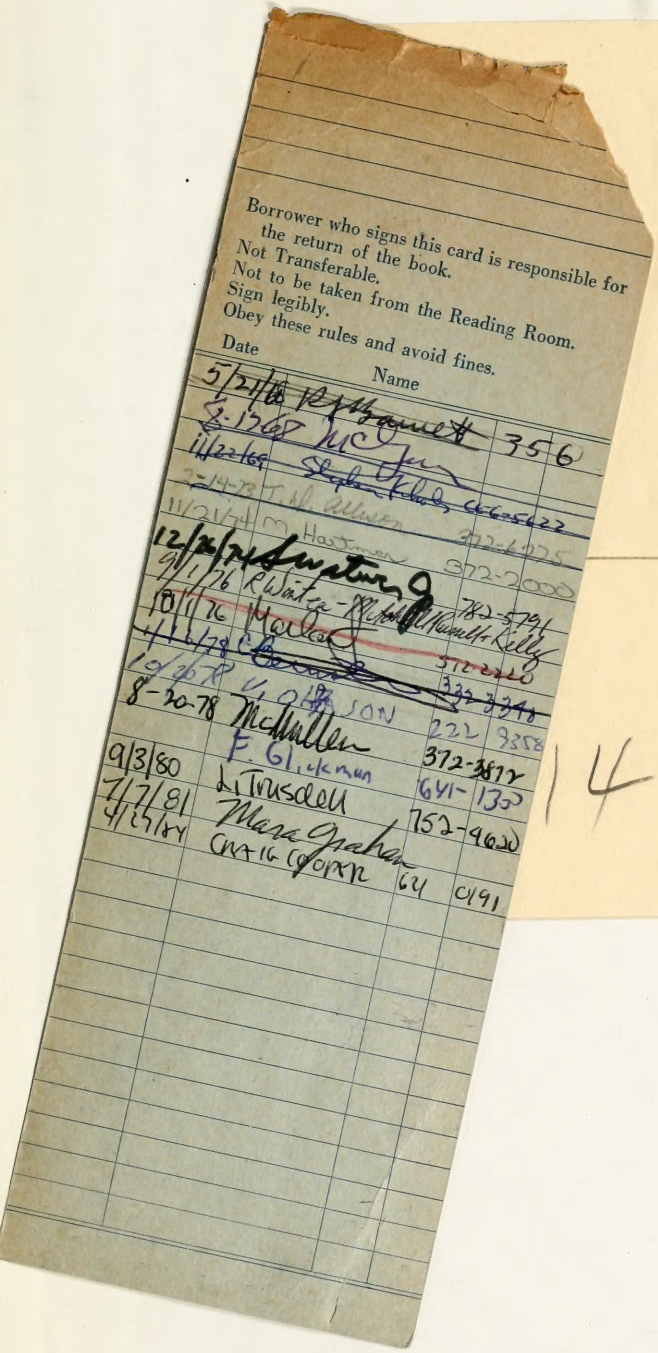
[illegible] 641 6888

6/27/ James Paul CE6 5622

6/27/ [illegible] 236 5622

GAYLORD NO. 139

9814



Borrower who signs this card is responsible for the return of the book.
Not Transferable.
Not to be taken from the Reading Room.
Sign legibly.
Obey these rules and avoid fines.

Date	Name	
5/21/68	R Hagwell # 356	
2-1768	MC Jan	
11/22/69	Stephen Hall, CA 95622	
2-14-73	T. M. Allison	
11/21/74	M. Hartman	372-4775
12/2/74	Swatson	372-2000
9/1/76	R Watts - R Nichols	752-5791
10/1/76	Mallen	372-2220
4/6/78	C Barnett	372-3348
10/26/78	G Johnson	222-9358
8-30-78	McMullen	372-3872
9/3/80	F Glickman	641-1322
7/7/81	L Trusdell	752-9620
4/14/84	Mara Graham	64 0191
	CMA 16 Coordn	

14